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18 Proceedings recorded by mechanical stenography.

19 Transcript produced by computer-assisted transcription.

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1 THE COURT: Okay. Good afternoon and welcome.

2 I know you've probably just gone through
3 it with the court reporter, but I'm going to need for my
4 own reference to do appearances of counsel one more time.

00:00:-16

5 We'll start with plaintiff, of course.

6 MR. EDWARDS: Jeff Edwards for the plaintiffs,
7 along with Scott Medlock, Mike Singley.

8 Amin, would you stand up with David and
9 announce yourself?

00:00:00

10 MR. ALEHASHEM: Amin Alehashem.

11 THE COURT: Sorry?

12 MR. ALEHASHEM: Amin Alehashem.

13 THE COURT: Welcome to all of you. Welcome.

14 MR. EDWARDS: And David James.

00:00:08

15 MR. JAMES: And David James.

16 THE COURT: Okay. For defendants, Ms. Burton.

17 MS. BURTON: Good afternoon, Your Honor.

18 Cynthia Burton and Matt Greer, Bruce Garcia, on behalf of
19 the Texas Department of Criminal Justice defendants.

00:00:21

20 THE COURT: Thank you all very much.

21 MS. HANEY: Good afternoon, Your Honor,
22 Lee Haney, Shanna Molinare, Steve Fernelius, Graig Alvarado
23 and Kara Philbin on behalf of UTMB and the UTMB defendants.

24 THE COURT: Thank you. Welcome to you too.

00:00:37

25 Okay. As I understood it, we had a

1 question about withdrawal of one set of counsel. Do we
2 still need to tend to that, or has that been resolved?
3 University of Texas, I thought, had withdrawn from the
4 case, their clinical program.

00:00:54

5 MS. BURTON: Your Honor, we don't object to the
6 motion to withdraw. We do think -- and we are
7 investigating some questions that we have, but it doesn't
8 need to be addressed today.

00:01:05

9 THE COURT: Okay. Very well. Very well.
10 Okay. I don't know if you had already discussed a program
11 for today or not, but I thought -- absent an agreement from
12 you, what I thought we'd do is go through each of the cases
13 that is pending and see if we are in agreement as to what
14 their current status is. Then we'll go through each of the
15 cases in detail and deal with pending motions. Does that
16 sound agreeable? Okay. All right.

00:01:29

17 In the Martone case, M-A-R-T-O-N-E,
18 there's no stay in place, and I think we've deferred the
19 qualified immunity motion while we did some limited
20 discovery; is that correct?

00:01:56

21 MR. EDWARDS: Yes. Yes, Your Honor. And I
22 think the Webb decision will lead to eventually depositions
23 being taken in that case.

00:02:08

24 THE COURT: Right. Right. Is that your
25 understanding, Ms. Burton?

1 MS. BURTON: Yes, Your Honor.

2 THE COURT: Ma'am, could you give me your name
3 one more time? I'm sorry.

4 MS. HANEY: Yes, sir, Lee Haney.

00:02:16

5 THE COURT: Haney. Thank you.

6 Okay. In the McCollum case, we've stayed
7 that pending district court ruling on the motion to
8 dismiss. In the Webb case, we've stayed pending the
9 interlocutory appeal to the Court of the qualified immunity
00:02:41 10 decision, and -- and the -- let's see, the Fifth Circuit
11 has determined it did not have jurisdiction to review; is
12 that correct?

13 MS. BURTON: Yes, Your Honor.

14 MR. EDWARDS: Yes, Your Honor.

00:03:03

15 THE COURT: Okay. So that stay can be lifted;
16 is that correct?

17 MR. EDWARDS: Yes, Your Honor.

18 MS. BURTON: Yes, Your Honor.

19 THE COURT: All right.

00:03:09

20 MS. BURTON: Just one thing that we wanted to
21 say, Your Honor, is at this point, it's very unlikely that
22 we would be filing a notice of appeal on that case.

23 THE COURT: Okay.

24 MS. BURTON: But we do have another case

00:03:21

25 pending, Hinojosa.

1 THE COURT: I was going to get to Hinojosa
2 next, yeah.

3 MS. BURTON: Okay.

4 THE COURT: And the discovery has been stayed
00:03:28 5 in that case, pending the appeal of denial of qualified
6 immunity, and we still don't have a ruling. I mean, we
7 checked it just an hour ago, and we still don't have a
8 ruling on that.

9 Okay. Okay. And then in the Caddell
00:03:46 10 case, we -- we have a tricky issue there, because
11 defendants' position is they complied with one set of
12 requirements, and that should be an airtight defense on
13 qualified immunity. So we'll take that up -- we'll take
14 that up last.

00:04:10 15 Okay. On Martone versus Livingston, there
16 are no pending motions in that case, no discovery stay in
17 place, and there's been a deferred ruling on qualified
18 immunity while limited discovery is proceeding. So I think
19 we can't do anything about that today; is that correct?

00:04:44 20 MR. EDWARDS: Well, I think -- I think how we
21 proceed in Martone will be affected by what the Court
22 desires us to do in the Webb case, I think.

23 THE COURT: Okay.

24 MS. BURTON: If I may, Your Honor.

00:05:04 25 THE COURT: Yes.

1 MS. BURTON: I think we'll be discussing that
2 more in more detail later. I know UTMB has some points
3 they want to make, but there is an issue with regard to the
4 limited discovery towards the executives and the expanse of
5 discovery that we have going on in the Bailey case.

00:05:21

6 THE COURT: Well, Bailey I'm going to do last.
7 But it is --

8 MS. BURTON: But with regard to 30(b)(6) --

9 THE COURT: Right.

00:05:29

10 MS. BURTON: -- depositions.

11 THE COURT: Right.

12 MS. BURTON: And there are still questions
13 about how we streamline, and we need the Court's assistance
14 in terms of time, place and manner.

00:05:42

15 THE COURT: Okay. And then turning to McCollum
16 versus Livingston, and here I think I'm significantly at
17 fault. I didn't do some of the things I should have done.

18 We have plaintiff motion to strike and
19 other motions that the parties disagree about. What --

00:06:07

20 plaintiff had filed a motion to strike UTMB's objections to
21 magistrate Judge Toliver's order on the motion for
22 sanction. Toliver is T-O-L-I-V-E-R.

23 I think UTMB mistakenly filed objections
24 to Judge Toliver's report and recommendation in this Court
25 rather than with Judge Lindsay, and UTMB requested that

00:06:35

1 this Court transfer its objections. And I misread UTMB's
2 response. I thought that it meant plaintiffs' motion to
3 strike was moot.

00:06:56

4 Anyway, Judge Lindsay overruled similar
5 objections that TDC -- TDCJ had properly filed. And then
6 I -- even then, I failed to transfer the objections to
7 Judge Lindsay. So those -- I apologize. I got that wrong.
8 But it seemed to me that the motion to strike would now be
9 moot, but the parties seem to think it's not moot.

00:07:35

10 So, Mr. Edwards, it's your motion. Tell
11 me what I need to do on this.

00:07:53

12 MR. EDWARDS: Very briefly, without going into
13 the subject matter of the sanctions motion, this happened
14 back, I believe, in January-ish time frame. And UTMB's
15 counsel filed the motion objecting to the magistrate's
16 recommendations in this court.

17 THE COURT: Yeah.

18 MR. EDWARDS: We immediately communicated that
19 that was the wrong court.

00:08:03

20 THE COURT: Not the right place, yeah.

00:08:17

21 MR. EDWARDS: And they nevertheless decided to
22 proceed onward, forcing us to incur additional attorneys'
23 fees. And in so doing, our position is simply, this wasn't
24 a mis -- this wasn't an accidental mistake. This was a
25 knowing mistake that was pointed out to them.

1 And after they read our brief, which is
2 identical to the conversation that I had with the former
3 counsel for UTMB, they then realized, oh, we really did
4 need to do this in Dallas, and then asked for forgiveness.
00:08:33 5 Which is fine if the Court is so inclined to send it to
6 Judge Lindsay, but given Judge Lindsay's immediate
7 overruling of TDCJ's objections, our position would simply
8 be they chose to file in the wrong court, therefore, they
9 would lack jurisdiction to re-file or transfer over to
00:08:51 10 Judge Lindsay.

11 Thank you, Your Honor.

12 THE COURT: Okay. Ms. Haney.

13 MS. HANEY: If I may respond briefly,
14 Your Honor.

00:08:57 15 THE COURT: Yes.

16 MS. HANEY: And, yes, the motion should have
17 been filed in Dallas. Unfortunately, I did not recollect
18 fully the conversation that we had with Judge Lindsay.
19 When I had the conversation with --

00:09:08 20 THE COURT: Mr. Edwards.

21 MS. HANEY: -- Mr. Edwards, I was not informed
22 that he had the benefit of the trial, of the hearing
23 transcript, which clearly had a discussion that it -- I
24 agreed that it should be in Dallas. And as soon as I had
00:09:18 25 the benefit of seeing that transcript, obviously, this was

1 not the correct court for it to be filed in, which is why
2 we ask that the Court consider moving our objections to
3 Dallas.

00:09:30

4 THE COURT: Well, I mean, is there something
5 left for Judge Lindsay to decide, or did he pretty --
6 pretty clearly signal his ruling when he ruled on the TDCJ
7 objections?

00:09:45

8 MS. HANEY: Your Honor, we would like -- I
9 would certainly like to think that we had some objections.

10 THE COURT: You mean some other ones?

11 MS. HANEY: Some other ones that should be
12 given due consideration.

00:09:56

13 THE COURT: Okay. I'll transfer it to -- to
14 the extent that I can, to Judge Lindsay, which I think
15 would moot the motion to strike.

00:10:13

16 And on the general question of attorneys'
17 fees and sanctions, my -- my philosophy on that, especially
18 in a case like this with as many parts and many litigants,
19 I'm going to keep tabs on the conduct from all parties, and
20 by the end of the case, I'll be ready to impose sanctions
21 or attorneys' fees if I think they're appropriate. But I'm
22 not inclined to do it motion by motion.

23 So that's what I'm going to do.

24 MS. HANEY: Yes, sir. Thank you.

00:10:27

25 THE COURT: Not just on this motion but on most

1 sanction motions.

2 MS. HANEY: Thank you, Your Honor.

3 MR. EDWARDS: Just to clarify, Your Honor, does
4 that mean that you're going to be transferring the motion
5 to the Northern District?

00:10:36

6 THE COURT: Yeah, I'm not -- I don't think I've
7 ever done that before. I don't know what document I sign,
8 but I'll try to. Maybe I'll just phone Sam. Would that
9 work?

00:10:45

10 MR. EDWARDS: It's fine if you were to phone
11 Judge Lindsay and let him know that TDC -- that UTMB has
12 objected and that his --

13 THE COURT: Okay.

14 MR. EDWARDS: That's fine.

00:10:55

15 THE COURT: Okay. Okay. Now, I think we -- we
16 are left with the question of Mr. Livingston's state of
17 knowledge, L-I-V-I-N-G-S-T-O-N. So the complaint, the
18 second amended complaint in McCollum, alleges that
19 Mr. Livingston inadequately responded to a recognized risk
20 to protect heat-sensitive inmates like Mr. McCollum. And
21 if -- if those allegations are true, then I think it would
22 probably constitute demonstrations that Mr. Livingston
23 acted with deliberate indifference to a known risk.

00:11:56

24 So I guess what we need to do is defer
25 ruling while we do narrowly-tailored discovery. That's

00:12:34

1 what it seems like to me we need to do, but let me hear
2 from you if you disagree.

3 MR. EDWARDS: The difference between the
4 McCollum motion and the other motions, the -- for instance,
00:12:51 5 the Martone motion where you did exactly that, the Webb
6 motions where the Fifth Circuit approved doing exactly
7 that, is that McCollum is -- was 18 months into discovery
8 and that depositions of many of the defendants have been
9 taken.

00:13:06 10 And so, you know, if the -- if TDCJ is
11 honestly planning on appealing that ruling, then I suppose
12 that we could go down that road with regard to Director
13 Livingston; however, if the Court could consider Judge
14 Toliver's prior rulings in which she -- she had made a
00:13:27 15 ruling that once the Court decides the issue, then Director
16 Livingston would be made available for a deposition. And I
17 believe her ruling indicated that it would be unlimited in
18 nature.

19 You know, in some respects, this is a
00:13:43 20 difficult issue because we have the Bailey case in which
21 Director Livingston is going to be deposed, which is --
22 plaintiffs' position is separate and apart from these
23 wrongful death actions. But if we're going to go down the
24 road, clearly Webb, your decision in Martone would indicate
00:14:01 25 that qualified immunity is inappropriate based on the

1 pleadings, and then we can do the limited deposition.

2 What I want to be very careful about,
3 especially with the directions given to my opponents, is if
4 we do limited discovery as to the executive level of
00:14:17 5 defendants, that does not apply in the Bailey case, which
6 we do view as completely separate.

7 THE COURT: Yeah.

8 MR. EDWARDS: And so there's a -- there's a
9 difference of opinion on that, and I respectfully ask the
00:14:31 10 Court to weigh in on that, because while I think it's
11 fairly clear that they're running on separate tracks,
12 they're different defendants, that -- that the scope of the
13 remedy is different, what knowledge matters is different,
14 that does not appear to be TDCJ's position.

00:14:46 15 THE COURT: Okay. Let me hear from TDCJ, then,
16 on that. You-all must have missed each other terribly
17 since our last hearing.

18 MR. GREER: Glad you said that. Always.

19 Your Honor, with regard to the motion
00:15:03 20 that's outstanding on Director Livingston at this time,
21 it's actually quite similar to the Hinojosa issue that's
22 still -- we're still waiting on that panel. So obviously,
23 we've heard from the Webb panel in this case. We haven't
24 yet heard from the Hinojosa panel. We certainly see the
00:15:19 25 benefit of taking this issue to a higher level with the

1 benefit of a full record. But it's difficult for us to say
2 that none of these appeals would go any further until we've
3 actually heard from Hinojosa.

4 In other words, if the Hinojosa decides --
00:15:35 5 decides their case in a way that's different from the way
6 that the Fifth Circuit handled Webb, that could create a
7 panel split and we have a situation where maybe we're in
8 en banc review, or something further.

9 So to jump into the -- the Livingston
00:15:53 10 12(b) (6) that's still pending in McCollum, I think the best
11 way is to wait and see what the Hinojosa panel decides.
12 And if they decide it in favor of the plaintiffs, I think
13 that will -- would likely have a dispositive effect on that
14 motion.

00:16:06 15 In terms of it going forward and in terms
16 of, you know, a limited deposition, limited to qualified
17 immunity and those issues as separate from the Bailey case,
18 you know, our intent is to streamline. And while they are
19 separate cases, they are far more alike than they are
00:16:27 20 different. And I think the questions that Director
21 Livingston -- would be directed to him, there will be a
22 considerable amount of overlap.

23 So maybe there's some hybrid compromise
24 that can be found, but to say that they have to be two
00:16:42 25 separate and distinct depositions, given the overlap in

1 those subjects, I think there is a way to streamline them
2 and make this process more effective rather than having our
3 people sit multiple times over and over.

4 So waiting on Hinojosa, based on what
00:17:00 5 Hinojosa says, I think that's the better way to approach
6 this, and, of course, if that goes their way, then this
7 question goes away.

8 THE COURT: Well, if it does go plaintiffs'
9 way, then, do I understand you're saying that
00:17:12 10 Mr. Livingston would be available for a deposition which
11 didn't have any limitations?

12 MR. GREER: Well, I think it would still have
13 to be limited to the subjects of qualified immunity, but if
14 there was a way to accomplish that and accomplish what we
00:17:29 15 need to accomplish for the Bailey case, we would be willing
16 to find a compromise in that rather than having two
17 complete separate days of depositions.

18 THE COURT: Well, I understand the reason.
19 That's not a good solution, but I just -- I'm trying to
00:17:43 20 understand where we're disagreeing.

21 I don't think anybody thinks that the need
22 for two different depositions is compelling.

23 But, Mr. Edwards, what -- what would --
24 would one deposition unlimited suffice?

00:17:56 25 MR. EDWARDS: Provided -- one deposition

1 unlimited, provided we can work out timing requirements
2 that take into effect -- account that there are eight
3 separate wrongful death matters and we need to go into
4 eight separate ideas.

00:18:11

5 So provided we could come up with
6 additional hours to justify that, I have no need to take
7 two depositions if they're unlimited and we can work out an
8 agreement as to time. I think we may be able to work out
9 an agreement as to time, but I know we will not be able to
10 work out an agreement as to scope.

00:18:27

11 And so if the scope is limited to
12 qualified immunity, then we need -- we definitely need two
13 and then perhaps a third deposition, once the Court were to
14 rule on qualified immunity. Our preference would be to
15 streamline and would be to do one deposition that would be
16 unlimited, provided everybody knows the rules going in and
17 provided we have sufficient time to complete that such that
18 none of the wrongful death plaintiffs are prejudiced.

00:18:41

19 THE COURT: Okay.

00:18:54

20 MR. EDWARDS: Thank you.

21 THE COURT: Let me hear from you, and I'll have
22 to take a short break. We've got an emergency call in
23 another case.

24 MR. GREER: I'll be brief, then, Judge.

00:19:13

25 I don't think that we could -- we can

1 necessarily say it's going to be an open and unlimited
2 deposition. There would have to be some designation, a
3 portion as to where those will fall. I think the idea that
4 we need to ask Mr. Livingston in-depth questions about each
00:19:27 5 individual death is a little bit beyond reality, given that
6 I think his involvement is on a much higher level than the
7 individuals specifically at issue. It's going to be -- I
8 would assume it would have to be more broad about policy
9 matters.

00:19:41 10 So in that regard, I don't -- I think we
11 could accomplish this in one day. I do think we can
12 appropriately designate what portion goes where, to do this
13 efficiently.

14 THE COURT: Excuse me for one second. Keep
00:19:55 15 your seats. Keep your seats.

16 (Break taken from 2:51 to 3:01.)

17 THE COURT: Please sit down. Well, I had to
18 spend time on a meaningless discovery fight. I'm sure glad
19 this suit doesn't involve any of that.

00:29:26 20 Okay.

21 (Laughing.)

22 MR. GREER: Your Honor, may I make one other
23 comment?

24 THE COURT: Yes.

00:29:30 25 MR. GREER: That is something that I left off

1 so we could break, but I think it was mentioned early on in
2 this case, and I think it was mentioned by you that some of
3 these depositions, it might benefit from having you present
4 for.

00:29:41

5 THE COURT: I think for Mr. Livingston, I may
6 need to be there for either all of his deposition or some
7 of it.

8 MR. GREER: I think that would give us -- some
9 of these issues about scope --

00:29:51

10 THE COURT: I think that's part of my job.

11 MR. GREER: -- and I --

12 THE COURT: Yes, sir.

13 MR. GREER: -- and I think that would also
14 probably just extend just to maybe a couple --

00:30:02

15 MS. HANEY: A couple of top --

16 MR. GREER: -- additional --

17 MS. HANEY: -- officials as well, Your Honor,
18 with Dr. Owen Murray in particular.

00:30:08

19 MS. BURTON: And Mr. Stephens, which would be
20 for TDCJ.

21 MR. GREER: I think it's a small handful, but I
22 think that would solve a lot of these disputes.

23 THE COURT: Where are we going to do these?

00:30:20

24 MR. GARCIA: Where would the Court like to do
25 them? Austin is the place we are available.

1 THE COURT: You-all have a preliminary
2 conversation. Austin is fine; Houston is fine. If we need
3 to do them at the prison, that's fine too, as long as we
4 can get a court reporter in there.

00:30:31

5 MS. BURTON: If I may, with regard to the
6 executives, we can present them in TDCJ headquarters. We
7 can present them in Austin or here in Houston at the
8 courthouse or some other place.

00:30:47

9 THE COURT: Well, there are many of you and
10 just one of me and both of my law clerks, so you-all pick
11 out a place that works for you, and I'll be there.

12 MS. BURTON: So that's our primary concern,
13 Your Honor, is time, place and manner for these top
14 executives.

00:30:59

15 THE COURT: And I don't think I can -- I'm not
16 sure I can form a judgment in advance of what is a
17 reasonable time.

00:31:11

18 I take Mr. Edwards' point, there are
19 different prisoners. There are different units. I assume
20 there are.

21 MS. BURTON: Yes.

00:31:24

22 THE COURT: And a different timeline. I mean,
23 I don't know how -- what's reasonable for each different
24 defendant. Every life is precious, to be sure. Without
25 being there, I don't know that I can form a judgment as to

1 what's needlessly repetitive and what's not.

2 MS. BURTON: So I think what we should do is
3 confer about that, but --

4 THE COURT: Yeah.

00:31:33

5 MS. BURTON: -- with the agreement that the
6 Court would be present for these top executives for UTMB
7 and TDCJ.

8 THE COURT: That's fine.

9 Do you object, Mr. Edwards?

00:31:41

10 MS. BURTON: I think the other details, we can
11 start to work out.

12 MR. EDWARDS: I have no objection to you being
13 present for any deposition you would like, obviously. And
14 I think that based on some preliminary discussions with
15 some of the counsel, that we could probably work towards
16 a -- some sort of agreement as to at least time and then
17 present that to you. That's my -- that's my thought on it.

00:31:51

18 THE COURT: Okay. Very well.

19 Okay. Let's just turn to Webb, which has
20 been consolidated with -- is it Togonidze,

00:32:19

21 T-O-G-O-N-I-D-Z-E, and Adams? I believe we now have a
22 motion for discovery sanctions. And plaintiffs -- I think
23 that UTMB made false statements about the existence of some
24 documents. UTMB says someone who did the document review
25 in-house didn't realize that -- that they would be

00:32:59

1 peer-review documents, and for that reason, they weren't
2 produced.

3 Then we have state law concerns and HIPAA
4 concerns. That's all capitals, H-I-P-A-A.

00:33:22 5 Have you made any progress on resolving
6 this?

7 MR. MEDLOCK: Your Honor, just to give you a
8 very brief outline of what happened here -- this is
9 Scott Medlock for the plaintiffs -- this is actually a
00:33:39 10 discovery dispute that predates the order for sanctions
11 that was approved in the Northern District before that,
12 before McCollum was transferred here.

13 Essentially what -- and that kind of
14 actually fed in the electronic store -- electronically
00:33:56 15 stored information issue kind of fed from this issue.
16 There were some investigations that we had requested into
17 the deaths of prisoners from heat exhaustion -- or from
18 heat stroke.

19 Those -- we were first told that those
00:34:10 20 records were privileged. Then we were told the records did
21 not exist. Then we did some extensive briefing on, no,
22 actually those records do exist, you need to produce them.

23 At that point, UTMB about-faced and said,
24 oh, actually, the records do exist. Here, we will produce
00:34:27 25 them in camera for review. Records were produced, were

1 reviewed in camera by the courts and then were produced to
2 us.

3 THE COURT: Well --

4 MR. MEDLOCK: We have the records. The only
00:34:35 5 issue is kind of the false statements that were made that
6 required us to do some work.

7 THE COURT: I understand that, but in a large
8 organization when there's a significant document request,
9 these things do happen. I mean, I'm not -- I'm not quick
00:34:48 10 to assume there's bad faith, but let me hear from -- let me
11 hear from defendant.

12 MS. HANEY: Yes, Your Honor. My co-counsel,
13 Ms. Molinare, is actually going to address this point.

14 THE COURT: Yes. Tell me your name one more
00:34:59 15 time. I'm sorry.

16 MS. MOLINARE: Shanna Molinare.

17 THE COURT: Thank you.

18 MS. MOLINARE: Your Honor, there actually were
19 no misstatements made at any course. At the time that any
00:35:09 20 statement was made, it was what was believed to be true at
21 the time.

22 The plaintiffs have confused a lot of
23 different documents, a lot of different discovery requests,
24 in the issues. In Webb specifically, their motion for
00:35:24 25 discovery sanctions comes out of their request for peer

1 reviews and some Morbidity and Mortality Review Committee
2 records.

3 They got information from -- about those
4 reviews from deposition testimony in McCollum. Instead of
00:35:42 5 talking with us and asking us whether or not we were the
6 custodian of the M and M records, they filed their motion
7 for sanctions. We are not the custodian of those records,
8 and we could have told them we cannot produce them to you
9 because we do not have them.

00:35:56 10 With regard to the peer-review documents
11 that are at issue in Webb, none of the -- there were no
12 peer reviews that were responsive to any of the requests in
13 Webb. So their motion for sanctions, it was -- it wasn't
14 even -- it's not even appropriate in Webb.

00:36:12 15 And as we explained, the reason that
16 additional documents came to light was in response to an
17 Adams -- a request in Adams which was much broader than any
18 of the requests made in Webb. And that's when the
19 additional facility reviews were discovered, which as
00:36:31 20 Mr. Eubank explained, it's not a nursing peer review. And
21 because we can construe one of the requests for
22 investigations liberally, we said, here -- we let them know
23 that here they are, but we're not going to give them over
24 to you until the Court has determined what we're going to
00:36:48 25 do with our state privileges.

1 And that's why we asked for the in-camera
2 review. There has been no bad faith. There has been no
3 trying to hide any sort of records, and everything that we
4 have ever discovered that is in any way responsive to any
5 of the requests has been produced.

00:37:02

6 At this point, we just don't think that
7 there's any -- there's anything left to discuss regarding
8 this motion.

9 THE COURT: Okay. Thank you very much.

00:37:11

10 Okay. Mr. Medlock.

11 MR. MEDLOCK: Just briefly, Your Honor, there
12 was a finding of bad faith by the Northern District in the
13 electronically stored information issue, and it's kind of
14 the same thing here, failure to look for the documents that
15 they should know exist. And it's -- to some extent,
16 they're still playing a shell game here, Your Honor. We
17 asked for investigations, whether they called them
18 morbidity, mortality reviews, or peer reviews, or death
19 investigations, or whatever. We're using, you know, a
20 common term that they should know these -- investigations
21 either happen or they don't. And they told us that first,
22 they're privileged, then they said, oh, no, they just don't
23 exist. And, you know, that caused us to do a lot of work
24 we wouldn't have otherwise had to do. That's why we're
25 requesting our attorney fees on that issue alone.

00:37:28

00:37:43

00:38:00

1 That's all we have, Your Honor.

2 THE COURT: Okay. As I've said before, I'm
3 going to carry along all these motions for sanctions and
4 attorneys' fees rather than decide them motion by motion.

00:38:13

5 Tell me what I need to examine in camera.
6 I'm not sure what I'm looking for if I do an in-camera
7 review.

00:38:23

8 MS. MOLINARE: That's already been determined,
9 Your Honor. Those records have already been disclosed to
10 the plaintiffs.

11 THE COURT: So no more in camera?

12 MS. MOLINARE: No.

00:38:37

13 THE COURT: Okay. Yeah, I'm not going to order
14 anything more than that. The documents have been produced.
15 That's the -- the main objective.

16 So I guess we now -- the stay is lifted --
17 as I've said before, the stay is lifted for all purposes.
18 Okay. All right. Very well.

00:39:04

19 Okay. In Adams versus Livingston, the
20 case is consolidated with Webb for discovery purposes, and
21 there are four motions to dismiss pending. Three are based
22 on qualified immunity claims. Those claims, motion is
23 filed by Owen Murray, M-U-R-R-A-Y, Nancy Betts, B-A --
24 B-E-T-T-S, and Stephen Fields.

00:39:27

25 Now, were these motions to dismiss based

1 on the qualified immunity argument that went up on the
2 consolidated appeal?

3 MS. MOLINARE: The Betts and Fields motions to
4 dismiss would not be, Your Honor.

00:39:42

5 THE COURT: Okay.

6 MS. MOLINARE: Because they are individuals
7 that are specifically just for that case.

8 THE COURT: Okay.

00:39:50

9 MS. MOLINARE: They're not executive level
10 defendants, so the arguments there --

11 THE COURT: How about Murray, then?

12 MS. MOLINARE: Murray's would be very similar
13 to the arguments made in the other cases with respect to
14 qualified immunity as an executive.

00:40:04

15 MR. MEDLOCK: Your Honor, Betts and Fields are
16 very similar to the motions in the Martone case that you
17 have already denied from those nurses, though. It's kind
18 of the same legal issue and the same qualified immunity
19 argument.

00:40:15

20 THE COURT: So I need to rule on those?

21 MR. MEDLOCK: Yes.

22 THE COURT: And they're ripe?

23 MR. MEDLOCK: They're ripe, Your Honor.

24 THE COURT: Then the fourth motion to dismiss

00:40:22

25 was filed by UTMB, and you're seeking dismissal of the ADA

1 and Rehabilitation Act claims; is that right?

2 MS. MOLINARE: Yes, Your Honor. I mean, I know
3 there was -- there is that motion that was filed.

4 THE COURT: And is that ready to be decided?

00:40:39

5 MS. MOLINARE: Yes, Your Honor.

6 THE COURT: Okay.

7 MR. EDWARDS: And, Your Honor, those motions
8 are identical to the motions that were denied in Martone
9 and that were also denied in the Webb matter before they
10 were consolidated.

00:40:50

11 THE COURT: Okay. I'll turn to those.

12 MS. HANEY: Your Honor, if I may, with respect
13 to the ADA motion on behalf of UTMB in the Adams case, I
14 think we would request that that motion be withdrawn from
15 the Court's consideration at this juncture, and then we'd
16 fully brief that later in the context of summary judgment,
17 if we may.

00:41:10

18 MR. EDWARDS: No objection from the plaintiffs,
19 Your Honor.

00:41:19

20 THE COURT: Which one is that, now?

21 MS. HANEY: The Adams -- UTMB's motion to
22 dismiss in the Adams case on the ADA and rehabilitation.

23 THE COURT: Okay. You want to defer that?

24 MS. HANEY: Yes, Your Honor.

00:41:28

25 THE COURT: So are you withdrawing that for

1 now?

2 MS. HANEY: Yes, Your Honor.

3 THE COURT: Okay. We'll consider that
4 withdrawn and now moot. Okay.

00:41:37

5 MS. HANEY: I mean, we do the same thing with
6 respect to the individual defendants in Webb, right? And
7 Adams, with Betts and Fields.

8 MR. EDWARDS: Plaintiffs have no objection to
9 the withdrawal of any of these motions.

00:41:52

10 THE COURT: To all three of them?

11 MS. HANEY: Yes, Your Honor.

12 THE COURT: Okay. All right. So all four
13 motions to dismiss are gone now?

14 MS. HANEY: Yes, Your Honor.

00:41:59

15 THE COURT: Okay. All right.

16 Okay. Is it -- how do you pronounce this?
17 Togonidze? How do you pronounce that?

18 MR. MEDLOCK: It's Togonidze, Your Honor.

19 THE COURT: Togonidze. As far as I know, there
20 are no pending motions. Discovery stay should be lifted
21 because of Webb, and we don't currently have any qualified
22 immunity issues pending before me, do we?

00:42:20

23 MR. EDWARDS: No, Your Honor.

24 THE COURT: Okay. All right.

00:42:37

25 Okay. And then Hinojosa versus

1 Livingston, we're currently stayed for the Fifth Circuit,
2 and we don't have anything to do, I don't think, until we
3 hear from the Fifth Circuit on that.

4 Okay. The Caddell case is different for a
00:42:52 5 couple of reasons. Obviously, one, the plaintiff is
6 fortunately not -- is still living, and we have the issue
7 of whether or not qualified immunity is established because
8 the defendants were following the edict of a previous
9 Court.

00:43:18 10 There are a good many motions pending.
11 Has there been any progress on any of these? We have the
12 motion -- plaintiffs' motions that would require defendants
13 to replead, plaintiffs' motion for judicial notice, motion
14 based on -- judgment on the pleadings based on qualified
00:43:39 15 immunity, defendants' motion to strike the complaint. I
16 mean, any progress at all?

17 MR. MEDLOCK: It would be the plaintiffs'
18 position that all those motions are ripe to be ruled on,
19 Your Honor.

00:43:57 20 THE COURT: Okay. I'm not going to -- I think
21 I'm going to have to have a separate hearing on the Caddell
22 motion for judgment on the pleadings based on qualified
23 immunity. That's a lot.

24 And in terms of defendants' motion to
00:44:16 25 strike allegations in 30 of the complaint's paragraphs,

1 Rule 12 does give me authority to strike pleadings that are
2 redundant, immaterial, impertinent or scandalous. I don't
3 know that I think they meet that severe standard.

00:44:42

4 Paragraph 94, for example, says that all
5 the defendants knew about the shockingly high number of
6 deaths due to heat stroke but made misrepresentations,
7 denied people had died. I mean, it may be that because
8 plaintiffs identify all defendants as having known these
9 facts, and in truth, it was only some of the defendants who
10 had been deposed at that point, probably -- that paragraph
11 probably could be re-pleaded.

00:45:14

00:45:48

12 On paragraph 17 to 25, 27, 28, 33, 27
13 through 41, 62, 80, 85, 87 and 88, the argument is that
14 those allegations -- or the allegations of those paragraphs
15 are immaterial and will confuse the issues to the prejudice
16 of the defendants. Most of this information is just from
17 the National Weather Service, the American Medical
18 Association, the National Institute for Occupational,
19 Safety and Health. They've appeared in a number of other
20 prison heat cases. I don't think there's a basis for
21 striking those.

00:46:10

00:46:31

22 And in paragraph 35 and 38 -- I think
23 these are misnumbered in the complaint. The allegations
24 that are in question are ones found on pages 9 and 10 and
25 in the first paragraph on page 11. These are paragraphs

1 contained in charts of prisoners who have died in TDCJ
2 prisons since 1998 of heat-related causes.

3 I mean, this is the kind of information
4 that's appeared in other prison cases. I don't think it
00:46:55 5 rises to the level that it should be stricken. So except
6 for the one -- the first paragraph we discussed, I don't
7 think I'm going to require re-pleading. I will ask that
8 that one paragraph be re-pleaded.

9 Okay. And I think maybe now that I've
00:47:18 10 ruled on the motion to strike, perhaps after plaintiffs
11 file their renewed complaint, maybe you can then rule on --
12 file a response.

13 MS. BURTON: Yes, Your Honor.

14 THE COURT: I mean, I think -- I think it's --
00:47:39 15 I think defendants are primarily doing what plaintiffs did.
16 Both the complaint and the answer seem to include some
17 extraneous detail, but I don't think it, again, meets the
18 standards for motion to strike. But I -- anyway, I'll
19 assume that defendant will file a new answer in response to
00:48:03 20 the new complaint.

21 Okay. On the plaintiffs' motion for
22 judicial notice of government documents -- you know, I'm
23 used to taking judicial notice of certain facts. When I'm
24 taking judicial notice of certain documents, I'm not sure
00:48:18 25 what facts are wrapped up in that.

1 Does somebody want to speak to that?

2 MR. SINGLEY: Yes, Your Honor. Mike Singley
3 for the plaintiff.

00:48:32

4 We are not asking you to take judicial
5 notice of the entirety of those documents. There are
6 certain portions of each document that form the basis for
7 allegations in the complaint, some of the ones Your Honor
8 was just talking about, the National Weather Service and
9 government websites.

00:48:45

10 And so they're just specific facts, for
11 example, risks of heat, what is the heat index and matters
12 like that. So we're not asking for the entire document.
13 There's certain subportions that support the allegations in
14 our complaint that we've listed in the motion for judicial
15 notice.

00:48:58

16 THE COURT: Have you -- can you make that more
17 precise, then, in another filing and tell them exactly what
18 facts you want me to take notice of?

00:49:08

19 MR. SINGLEY: And I wanted to apologize to the
20 Court. We had intended to mark those up on the exhibits
21 that didn't get done, and so I would request that we submit
22 what specifically we're asking for, the exact wording, if
23 Your Honor would permit it.

00:49:20

24 THE COURT: Leave is granted at this time.

25 MR. SINGLEY: Thank you, Your Honor.

1 THE COURT: There is no discovery stay in
2 Caddell, so I'll just -- it's for me to set that for
3 another hearing.

00:49:34

4 Okay. Then having discussed the cases
5 except for Bailey, there are four global issues that I
6 think we need to address: Discovery progress; secondly, if
7 we haven't already discovered it, discovery stays; third,
8 setting schedules for dispositive motions in trial; and
9 fourth, I just want to make sure the parties continue to
10 oppose all motions to intervene.

00:49:56

11 Let me just start with discovery progress.
12 Tell me how things have been going and what might need
13 attention from the Court.

00:50:13

14 MR. EDWARDS: Cynthia, would you like to do
15 this jointly?

16 MS. BURTON: Sure.

00:50:28

17 MR. EDWARDS: You know, I think I describe it
18 as, you know, tentatively progressing with an -- with an
19 eye towards the Fifth Circuit rulings in Webb and perhaps
20 in Hinojosa. I think now that the Webb court has ruled, I
21 think we need to get together, and I think we need to
22 decide --

00:50:41

23 MS. HANEY: I thought you were speaking to
24 Caddell, but if you're speaking to all of them, then
25 include UTMB.

1 THE COURT: I invited global response.

2 MR. EDWARDS: Would you like me to go case by
3 case? I'm happy to do that.

4 THE COURT: No, I want just global.

00:50:50

5 MR. EDWARDS: I think we need to decide on a
6 schedule and a progress, and we will likely probably have
7 to come back to court on that. But in terms of the
8 lower-level witnesses, some progress has been made, not
9 enough. I think in terms of the timing of the cases, I

00:51:04

10 think what would be appropriate -- and, again, we ought
11 to -- I think we ought to confer about this before the
12 Court rules or -- but I'm happy to have the Court rule.

13 My preference would be to treat the
14 wrongful death cases -- even though the MDL panel did not
00:51:19 15 choose to call it an MDL, that -- that we could coordinate
16 it as a type of MDL in terms of, you know, plaintiffs would
17 select a case to be tried first. Defendants would select a
18 case to be tried next, and we would develop coordinated
19 discovery schedules with that, with the one caveat I think
00:51:38 20 that given the amount of -- I think everyone's in agreement
21 that McCollum should go first, given all the discovery
22 that's been taken.

00:51:53

23 And there are some -- there are some
24 individual issues in the McCollum case that may need the
25 Court's attention in terms of deadlines. You know, when

1 McCollum was stayed, the discovery period had ended.
2 Experts had been designated, and all the discovery that was
3 technically left to be done before the motion for sanctions
4 and all the electronic discovery was finally produced was
00:52:13 5 some outstanding depositions that the plaintiffs were going
6 to take of defendants' experts when they produced their
7 reports.

8 Now, that was, boy, a long -- a
9 year-and-a-half ago, and we still have not received the
00:52:27 10 expert reports in the McCollum case. And so I think the
11 Court has a choice to make, or we just need some direction.
12 Our position is, look, the deadlines have passed. Let's
13 set the case for trial and let prior agreements be in
14 effect. If the Court's inclined to re-open discovery, then
00:52:47 15 I think we need to get together and decide on schedules and
16 have trial as expeditiously as possible.

17 I mean, that's -- that's where we are on
18 the McCollum case. All the other cases, you know, whether
19 they've proceeded quickly enough or not, I think now we can
00:53:06 20 take steps to coordinate the scheduling, the discovery, and
21 go from a low level, top level down. The one kind of
22 elephant in the room is simply, you know, the scope of some
23 of these depositions on the qualified immunity front.

24 And then it would be helpful to know
00:53:24 25 whether, you know, TDCJ, perhaps UTMB, plan on, you know,

1 appealing the next qualified immunity summary judgment
2 motion. Because if that's the intent, then it makes no
3 sense to spend ten months in discovery only to have a
4 motion for summary judgment up to the Fifth Circuit,
5 another year-and-a-half goes by, and more plaintiffs, you
6 know -- and it's not just the delay for the sake of delay.
7 We've had two plaintiffs die --

00:53:46

8 THE COURT: I understand.

9 MR. EDWARDS: -- while we've waited. I don't
10 cite that for any high effect. I just mean -- I'd like us
11 to be up front. If the strategy on the defense part is
12 we're going to be appealing the next motion for summary
13 judgment, let's do everything we can on discovery in that,
14 get that back up to the Fifth Circuit as fast as possible.
15 That would be our preference.

00:54:01

00:54:13

16 Now, we ought to be able to work that out.
17 We ought to be able to do that together. As a
18 professional, I wish I could say I'm certain that that's
19 going to happen, but we've been here probably too often for
20 me to have confidence in that. So I think guidance from
21 the Court as to what you think the best approach would be,
22 would be helpful, with the one McCollum much further down
23 the road, much more involved, and we'd like to try that as
24 fast as possible.

00:54:24

00:54:38

25 THE COURT: Okay. Which one of you wants to go

1 next? Ms. Burton?

2 MS. HANEY: Go ahead.

3 MS. BURTON: Okay.

4 Yes, Your Honor. We both believe that the

00:54:47

5 McCollum case does require further discovery, and we don't

6 believe that that case should be stayed for discovery.

7 There's been a significant amount of ESI discovery, as you

8 know, that has been done that has been provided in a global

9 sense that's applicable to all the pending cases.

00:55:08

10 We also believe that with regard to the

11 Bailey case, it has a substantial influence on how fast

12 these cases can progress. The Bailey case 30(b)(6)

13 requests are, as you know, TDCJ generally, and I'm -- I

14 would imagine that there will be those kind of requests

00:55:32

15 submitted to UTMB also, now that these stays are lifted.

16 So those -- those are not two different kinds of requests.

17 They apply to all the cases, and a great deal of the --

18 both the death cases and the class action.

19 So part of our problem is what are we

00:55:54

20 doing in the class action? We're presenting -- are working

21 on presenting witnesses in the Bailey class action, and how

22 does that coordinate, tie in or streamline with the same

23 kind of evidence -- evidentiary questions that are

24 applicable to the death cases.

00:56:14

25 So to the extent that we can streamline

1 those requests to be applicable to all the cases, then
2 we're going to make progress on all the cases at the same
3 time.

00:56:29

4 So that -- that's -- we had discussed this
5 with UTMB prior to the hearing, that part of the
6 consideration for setting trials or deadlines in the death
7 cases is exactly what kind of discovery in Bailey is going
8 to be happening right now and how much of that is going to
9 be applicable to the heat cases -- to the heat death cases.

00:56:54

10 So that was one of our questions.

00:57:21

11 And also to a certain extent with the
12 schedules of everyone, it is difficult to move all of these
13 things along at one time. We had submitted, for instance,
14 a list of witnesses to plaintiffs in February with March
15 dates for the 30(b)(6) depositions, and we didn't even get
16 to start scheduling those or know the names of the specific
17 witnesses on a pretty lengthy list that they wanted to
18 depose until mid to late June.

00:57:40

19 So things are very time-consuming to
20 accomplish.

21 THE COURT: I don't doubt that. But, I mean,
22 do we think now that we've heard from the -- what the
23 Fifth Circuit thinks about qualified immunity, so we won't
24 have any more interlocutory appeals?

00:57:50

25 MS. BURTON: Well, I can't guarantee it. I

1 don't know about UTMB. We don't know what the summary
2 judgment motions -- how those will be ruled on, what the
3 evidence will show right now as far as what we can include
4 in those summary judgment motions. But I would answer that
5 if we disagreed with a ruling, for instance, on
6 Mr. Livingston's qualified immunity, that it would be
7 appealed at the summary judgment stage, yes, Your Honor.

8 MS. HANEY: And, Your Honor, if I may respond
9 to that as well, but going back to your original question

10 on progress, I just want to seek clarification from the
11 Court. As I understand it, it's the Court's ruling that
12 the stays are lifted in every one of the wrongful death
13 cases with the exception of Hinojosa; is that correct?

14 THE COURT: That's what I meant to say, I
15 think.

16 MS. HANEY: I just want to make sure.

17 THE COURT: Do you disagree?

18 MS. HANEY: No, no. That was what I
19 understood, and I just wanted to make sure that that was --
20 I understood correctly.

21 THE COURT: Yeah. Yes.

22 MS. HANEY: Okay. And then with respect to
23 your question regarding any further interlocutory appeals,
24 I can foresee that, you know, we're going to have a number
25 of summary judgments with individuals with qualified

1 immunity issues, and depending on the rulings of this Court
2 and the evidence presented, we may very well have a need
3 to --

00:59:04

4 THE COURT: Is that pretty well stretched -- I
5 mean, not that I'm confident I get everything right, but
6 that really will involve a lot more time.

7 MS. HANEY: I understand, Your Honor, but, you
8 know, certainly our clients would be entitled --

9 THE COURT: Yeah.

00:59:16

10 MS. HANEY: -- to pursue that if need be.

11 THE COURT: But I -- I'm just thinking that
12 with the benefit of some of these rulings we've gotten from
13 the Fifth Circuit, we -- we might be able to extrapolate
14 those, what the outcome would be, to a slightly different
15 set of facts.

00:59:31

16 MR. EDWARDS: And I think, Your Honor, one
17 solution might be, if the Court is inclined, as they did in
18 Martone, not to stay the case. Pending any interlocutory
19 appeal, we could go forward to trial.

00:59:44

20 And so --

21 THE COURT: I think -- I think the court of
22 appeals might mandamus me on that, though, if we --

23 MS. BURTON: Well, we were suggesting, if I
24 may --

00:59:54

25 Excuse me, Mr. Edwards.

1 MR. EDWARDS: Absolutely. Sure. Sure.

2 MS. BURTON: What we had been discussing among
3 the defendants is that we would stagger the briefing on the
4 summary judgments for the cases, and this, we would discuss
01:00:09 5 with the plaintiffs, but that the Court, in essence, would
6 rule on all of them at the same time. In other words, we
7 don't have eight summary judgments due on the same day.

8 THE COURT: Yeah, I understand that.

9 MS. BURTON: But that way, when we go up on
01:00:22 10 appeal, it all goes up on appeal at the same time, you
11 know, with the same questions if they exist.

12 Now, we -- right now, we can't say that
13 for sure we will have an appealable issue. You might grant
14 our motions for summary judgment for some of the
01:00:38 15 executives, once we have a more robust record in front of
16 the Court.

17 THE COURT: Well, I'm -- certainly these
18 judicial immunity -- I mean, official immunity questions
19 are important. I just -- I mean, it's -- Mr. Edwards and
01:01:00 20 others have said there is time sensitivity to these cases,
21 and I --

22 MR. EDWARDS: One of the particular dilemmas
23 here, Your Honor, is that given the Americans with
24 Disabilities Act claim that is brought, I mean, there
01:01:17 25 really is a strong argument that had we just brought the

1 ADA claim and not brought 1983 actions, that there is no
2 immunity and we could just simply go -- proceed to trial,
3 provided the claim was amply stated.

01:01:33

4 The fact that it's -- that this claim that
5 we could simply go to trial with is also coupled with
6 claims where immunity is at issue, I think might give you
7 some flexibility in terms of tailoring.

01:01:47

8 Now, I think a better solution, frankly,
9 would be for us to get together and try to work it out.

01:02:02

10 We've been unsuccessful for a long period of time at doing
11 that. Maybe it's worth one more try. These are
12 different -- I mean, there are a lot of different lawyers
13 in the room now than when we began and then, frankly, when
14 most of these motions were briefed. I'm certainly willing
15 to do that, but I do think that that would require,
16 unfortunately -- maybe we could schedule -- that would
17 require probably another status conference sooner rather
18 than later, to keep us -- to keep us going.

01:02:16

19 My real concern, though, is just McCollum
20 was within a couple of months of a trial setting, and then,
21 boom. And with regard to -- well, with regard to the
22 streamlining issue that keeps getting discussed, I want
23 to -- I want to make sure that the Court understands our
24 position.

01:02:32

25 We're all for efficiency. We're all for

01:02:51

1 streamlining. But with regards to the McCollum case, the
2 fact that 70,000 documents were produced when they weren't
3 disclosed, as a result -- and these aren't my words --
4 Judge Toliver's finding of bad faith, our position would be
5 simply, it would be unfair for the defendants to benefit
6 from an act of bad faith.

01:03:06

7 Now, there -- they've effectively
8 benefited by being able to delay them. And, again, I'm not
9 casting dispersions on the attorneys in this room, but the
10 fact of the matter is Judge Toliver found those issues.
11 And we had deadlines in place. We had a schedule going.
12 I'd urge you to take -- just simply take a look at where we
13 were in that case, and then perhaps we can go back and try
14 to incorporate -- incorporate a schedule.

01:03:25

15 THE COURT: Well, you -- one suggestion was
16 particularly interesting. I mean, could we sever the ADA
17 claim and try it?

01:03:43

18 MR. EDWARDS: Yes. There are a lot of creative
19 solutions that we could possibly engage in. We could
20 perhaps sever the executive-level defendants and try them
21 all as one case, and then go forward individually on the
22 ADA claims and the low -- lower-level defendants. There's
23 a lot of creative approaches that we could explore here,
24 but I -- I -- this is not Ms. Burton, and it's certainly
25 not Ms. Haney.

01:03:59

1 What's been told to me before by other
2 counsel, admittedly, is that, look, we're going to take
3 every bite at that apple, and if delay is what we get,
4 then --

01:04:08

5 THE COURT: Well, I understand.

6 MR. EDWARDS: And that going forward, that's
7 not what I see here at all. But I'm open to creative
8 solutions, and maybe we can -- maybe we can talk about
9 those.

01:04:17

10 MS. HANEY: Well, Your Honor, I think -- I
11 think the key is -- when he was talking about the fact that
12 McCollum is certainly the closest to being ready for trial,
13 and while I absolutely agree with that, we had not had an
14 opportunity to file summary judgments in that case and for
15 the Court to entertain those motions.

01:04:30

16 I think there actually was one filed at
17 the last minute, actually, in McCollum, but we had
18 withdrawn that when the case was transferred for you, with
19 the presumption that there would be a new scheduling order.

01:04:41

20 And I think we certainly need an opportunity to advance a
21 dispositive motion. I'm sure TDCJ would agree with that.

22 MR. EDWARDS: We don't disagree with that at
23 all. That's true.

24 MS. HANEY: I think that's true, really, in
25 every case. We just have, you know, obviously complete

01:04:52

1 discovery and have an opportunity to brief the Court
2 through dispositive motions.

3 THE COURT: Do we have any assurance that all
4 these appeals will go to the same panel? I guess not.

01:05:08

5 MR. EDWARDS: No, Your Honor.

6 MS. BURTON: Not unless we -- that's why we're
7 suggesting that all the briefing be staggered.

8 MS. HANEY: That ruling be at one time.

01:05:21

9 MS. BURTON: That the ruling will be at one
10 time in the hopes it would go before the same panel,
11 Your Honor.

12 MR. EDWARDS: We attempted to coordinate that
13 the last time, and we got two panels. And so I think we
14 can attempt to stagger. I mean, I suppose if there's one
15 ruling on all the motions, that would be a way, but that's
16 going to be --

01:05:35

17 THE COURT: That's going to slow it down.

18 MR. EDWARDS: I think that's going to slow
19 things down quite a bit and make it much harder on -- I
20 think it would make it harder on everybody.

01:05:44

21 MS. BURTON: I think we would have to move to
22 consolidate them at the Fifth Circuit and say, you know, in
23 each of these, there is a similar question, if there is.
24 We may not even be taking all of them up.

01:05:58

25 MR. EDWARDS: And, again, Your Honor, I think

1 we can talk about this, but the issue of consolidation is
2 an important one. There are five cases that are
3 consolidated at the current time. All of them are not
4 consolidated. I mean, if TDCJ or UTMB wishes them to be
01:06:18 5 consolidated, I mean, that's something that we could -- we
6 would consider, but that's not where the -- the current
7 posture is. And so --

8 MS. BURTON: Well, let's be careful. They're
9 consolidated for purposes of discovery but not for trial,
01:06:29 10 and that's part of why we're in one courtroom is so that we
11 can work through all of the heat cases, including Bailey,
12 for purposes of discovery and dispositive motions in a
13 consolidated and organized manner. That's exactly what
14 we're trying to accomplish. But each case would still be
01:06:48 15 separately tried.

16 THE COURT: We'll take a ten-minute break.

17 (Break taken from 3:38 to 3:52.)

18 THE COURT: Okay. My law clerk says I didn't
19 make one thing clear. In McCollum, I am going to defer
01:20:57 20 ruling on qualified immunity and allow limited discovery.
21 On McCollum, defendants seem to think more discovery is
22 appropriate. What -- what more does need to be done in
23 that case?

24 MR. GARCIA: Your Honor, the plaintiffs'
01:21:24 25 experts need to be -- there's a couple of plaintiffs'

1 experts that need to be deposed. There are a couple of
2 defendants' experts that still need to be deposed. And in
3 addition, in light of the sanctions order from
4 Judge Toliver, there were other depositions ordered to be
5 reconvened with the new information that was given. And
6 there were approximately, I think, five or six that had to
7 be redone.

8 MR. EDWARDS: There were -- there were six --
9 up to six depositions at plaintiffs' discretion were
10 ordered to be retaken. And so everything Mr. Garcia told
11 you is accurate. The issue is, what comes about as a
12 result of the additional depositions that were the result
13 of sanctions.

14 So if it's new information and we all
15 should use this new information, then we would probably
16 have to set a plaintiffs' expert deadline and a defendants'
17 expert deadline. If, however, it's -- you're more of the
18 viewpoint that whatever conduct Judge Toliver found should
19 not be rewarded, then it's we would take the six
20 depositions, and then we would have a dispositive motion
21 hearing and set a trial date and come from -- from what
22 there.

23 We need -- I suppose we need your guidance
24 on that as to what you want to do so that we can
25 incorporate a schedule. But if -- if the --

1 THE COURT: Well, all I need is -- short-term,
2 is for you to do enough discovery that would allow me to
3 decide qualified immunity, right?

4 MR. EDWARDS: Yes, exactly.

01:22:49

5 THE COURT: Well, can we do that and give that
6 priority and then --

7 MR. GARCIA: Yes, sir.

8 THE COURT: -- then --

01:22:57

9 MS. BURTON: Yes, Your Honor, subject to what
10 we were talking about with regard to Mr. Livingston and
11 Mr. Stephens.

12 THE COURT: Well, don't let my availability
13 delay things. I'll make myself available. I really will.

01:23:16

14 See, I thought one thing that plaintiffs
15 were saying was that McCollum was nearly done. It doesn't
16 sound like it's all that close to being done.

17 MR. EDWARDS: Plaintiffs' position is in light
18 of the sanctions order, we have additional discovery that
19 we can do.

01:23:29

20 THE COURT: All right.

21 MR. EDWARDS: But it is within four to six
22 months of being ready. That's plaintiffs' position.

01:23:43

23 MR. GARCIA: I would think that is a little
24 optimistic but probably dead-on, pretty close, with the
25 summary judgment deadline somewhere in those six months as

1 well, Your Honor.

2 MR. EDWARDS: Absolutely.

3 THE COURT: Well, should we pick a summary
4 judgment deadline right now? I mean, are you close enough
5 to the end that we can do that?

01:23:55

6 MS. HANEY: Well, I think, Your Honor --

7 MR. EDWARDS: Yes.

8 MS. HANEY: Well, Your Honor, I think UTMB
9 would ask the Court for clarification on whether -- on just
10 how much discovery would be allowed in terms of -- I mean,
11 are we opening it for the limited purpose of qualified
12 immunity, or are we opening it for expert deadlines on
13 behalf of plaintiff and defendant and an opportunity to
14 depose those experts before the dispositive motion?

01:24:04

15 THE COURT: Well, I think defendants are
16 entitled to a ruling on qualified immunity. That comes
17 first. The theory is that officials are to be spared not
18 just the trial but everything else. So I'd like you-all to
19 tee that one up as quickly as possible.

01:24:19

20 Now, I don't see any reason that you can't
21 simultaneously be working on the expert testimony. I mean,
22 am I missing something?

01:24:38

23 MS. HANEY: No. I just think that we would go
24 to the Court for new expert deadlines and as part of the
25 scheduling order and a close -- a definitive close date for

01:24:53

1 discovery.

2 THE COURT: What if we set a summary judgment
3 deadline for qualified immunity, just do that for starts?

4 MS. BURTON: Will it apply across all those
5 cases?

6 THE COURT: No, no.

7 MS. BURTON: Just for McCollum?

8 MS. HANEY: Just McCollum, I think.

9 MR. EDWARDS: Three months? I mean, I think
10 the fight is going to be the deposition of Mr. Livingston,
11 and do they want to do it over two days as to everyone.

12 THE COURT: Yeah. Yeah.

13 MR. EDWARDS: But there's going to be a
14 separate issue there.

15 THE COURT: Okay.

16 MR. EDWARDS: But just so Your Honor knows,
17 we -- the time we would need would be to schedule five to
18 six depositions, take Brad Livingston, his deposition,
19 because he's the only one who really is -- is at issue for
20 qualified immunity.

21 Mr. Garcia or Ms. Burton, if you disagree
22 with that in that particular --

23 MR. GREER: Yeah. Yes.

24 MR. EDWARDS: Okay.

25 MR. GREER: I'll speak to that. Yes.

1 THE COURT: Okay. How about November 2nd
2 as a -- as a summary judgment motion deadline, on at least
3 qualified immunity?

01:26:01

4 MR. EDWARDS: That's fine with plaintiffs,
5 Your Honor.

6 MS. BURTON: We will work towards that. We
7 have to check with Mr. Livingston for his schedule.

8 THE COURT: I understand.

9 MS. BURTON: Okay.

01:26:09

10 MR. GREER: Not to muddy the waters, Your
11 Honor, but I'm just looking at my calendar, and what we've
12 seen already is that's going -- the class action will be
13 hot and heavy at that point. The dispositive motion in the
14 class action is November 6th. The -- October, I think,
15 is -- late September and October is class cert briefing, so
16 I -- some of that may get stacked up in terms of getting
17 that done while the Bailey litigation is going on as well.
18 So I think that's worth considering if we're setting it up.

01:26:26

19 THE COURT: Well, of course, the other
20 deadlines might bend too. So why don't we -- why don't we
21 keep marching as if November 2nd is going to be our
22 qualified immunity summary judgment deadline.

01:26:43

23 Let's go back to what I was saying the
24 global issues were. We've talked now about -- we've talked
25 about discovery progress, discovery stays. We've talked a

01:27:11

1 little bit about a schedule -- scheduling and dispositive
2 motions. I don't see we need to set a trial date yet.
3 That's too optimistic. Motions to intervene, do you still
4 want me to deny all those?

01:27:30

5 MS. BURTON: Yes, Your Honor.

6 MR. EDWARDS: Yes.

7 THE COURT: Okay. Okay. Unless there's
8 anything else, I propose we turn to Bailey now.

01:27:45

9 Okay. Defendants have filed a motion to
10 limit the number of medical records, have an issue of
11 scheduling a hearing on class certification and discussing
12 the impact, if any, of the Fifth Circuit's decision in *Ball*
13 *versus LeBlanc*. LeBlanc is L-E, capital B-L-A-N-C, all one
14 word.

01:28:04

15 On the medical records, I -- I would
16 appreciate your thoughts. I really don't feel at all
17 confident to know how much is enough on that.

01:28:46

18 I mean, I -- I appreciate that there's --
19 there are manageability issues. I don't know enough about
20 whether random selection of medical records is appropriate
21 or whether non-random, but nonetheless, individualized
22 production makes sense. We have a Pack Unit average
23 population of 1460 offenders. I don't know if that's the
24 right number to start with, or are we talking about number
25 of people who are at Pack Unit who are heat sensitive?

01:29:11

1 Give me some help. Give me some help on this.

2 MS. BURTON: Your Honor, I believe that this
3 discussion would be more useful after we determine the
4 effect of the Ball case on the Bailey class action and what
5 the scope of the class action is going to be.

01:29:29

6 THE COURT: Okay. All right.

7 MS. BURTON: And --

8 THE COURT: That's fine. You want to turn to
9 that?

01:29:36

10 MS. BURTON: Yes, but there is one housekeeping
11 matter, if I may just take a --

12 THE COURT: Yes.

13 MS. BURTON: -- digression.

14 THE COURT: Yes.

01:29:41

15 MS. BURTON: Okay. We recently had 30(b)(6)
16 depositions in the Bailey case, and a UTMB attorney
17 attended to observe the depositions. Part of it is with
18 regard to the streamlining process and also because they
19 are our contract medical provider for TDCJ.

01:30:01

20 The plaintiffs have objected to UTMB being
21 allowed to attend the TDCJ 30(b)(6) depositions in the
22 Bailey case, and we would like to ask that they be allowed
23 to do that. And I think the plaintiffs might have some
24 reasons why they don't want you to allow that.

01:30:23

25 THE COURT: Okay. Let me hear from plaintiffs.

1 MR. EDWARDS: I think that should be addressed
2 on a case-by-case basis and with proper notice to the
3 plaintiff, to the plaintiffs, the same way any deposition
4 is run. The issue --

01:30:36

5 THE COURT: Well, I take your point, but just
6 is there a policy argument for them not being allowed to
7 attend? I mean, I'm for whatever makes this thing go
8 quicker, and if that will help things -- move things along,
9 I'm for it.

01:30:50

10 MR. EDWARDS: If there's an agreement that
11 anything that can be used -- if their -- if their presence
12 is necessary for us to utilize those depositions in other
13 cases, then I suppose there'd be a policy argument for them
14 being present.

01:31:03

15 If that is not the issue, then there's no
16 policy argument for them being present other than if
17 there's a particular need that -- that they could move the
18 Court, ask the plaintiffs. I can't articulate a -- you
19 know, a huge prejudice to the plaintiffs if they're -- if
20 it is known in advance that they are merely observing and
21 not participating, you know.

01:31:22

22 THE COURT: Yeah, I see the issue. I mean, if
23 they're there for that purpose, we have one kind of
24 deposition. If they're there to participate, then we may
25 end up they're asking questions and could make the

01:31:38

1 depositions a lot longer, right?

2 MS. BURTON: Well, and that -- that's the
3 problem, Your Honor, is that many of these issues do
4 overlap into the heat-related cases. And if these were
01:31:51 5 30(b)(6) depositions on the very same question and they
6 were presented in the heat re -- death-related cases, then
7 UTMB would definitely be entitled to participate and ask
8 questions.

9 But, you know, that's part of why we're
01:32:06 10 arguing that the Bailey case 30(b)(6) depositions where it
11 was ordered, that they discuss TDCJ generally, the health
12 and welfare of inmates generally at the Pack Unit. They're
13 30(b)(6) questions, official position. That's why we're
14 saying that these need to be streamlined with regard to all
01:32:32 15 the heat-death cases rather than having multiple
16 depositions.

17 Now, at this point, UTMB simply observed
18 for the deposition they attended. They did not
19 participate. But there are subjects in which UTMB may want
01:32:50 20 to participate because the depositions are being used in
21 pleadings across the board, as I'm sure you've seen.
22 Depositions from McCollum are pled in Caddell.

23 THE COURT: I understand. I understand. Let
24 me hear from Ms. Haney.

01:33:05 25 MS. HANEY: Certainly, Your Honor. And with

01:33:18

1 respect to the deposition, it was one that transpired last
2 week, and we did send one of the lawyers on our team. And
3 it turned out that the deposition that she had been sent to
4 observe, which was that of a risk manager, which would have
5 had a bearing on -- potentially on medical issues, did not
6 actually take place, and so she just sat through a security
7 deposition, which really didn't have any bearing on
8 medical.

01:33:32

9 But the whole purpose and the reason that
10 we sent her was you had asked us at the last status
11 conference to try to streamline to the extent we could.
12 And since, you know, the practice thus far has been -- of
13 what we've observed, is that plaintiff tries to utilize
14 information from Bailey in these other cases. Obviously,
15 that was simply our intent in sending someone to observe.

01:33:48

16 Now, if anything elicited in Bailey is not
17 going to be used in the wrongful death cases, we certainly
18 have no reason to attend. But --

01:34:00

19 THE COURT: Are you asking just to observe, or
20 are you asking to question also?

01:34:14

21 MS. HANEY: Well, I mean, we were -- we had
22 sent someone simply to observe, but if there's a chance
23 that this information is going to be potentially utilized
24 against UTMB matters, information from Bailey, then we
25 would certainly ask for the opportunity to defend.

1 MR. EDWARDS: Again, I don't -- I don't
2 disagree with what Ms. Haney says in terms of our
3 affirmative use. I'm unaware of anything in the Bailey
4 case being affirmatively used beyond -- as evidence.

01:34:30

5 It's -- it hasn't come up. We have
6 specifically -- we had specific agreements relating to
7 depositions in the other cases to quote/unquote streamline,
8 but this word "streamline" keeps being thrown about as if
9 the Court has issued a ruling. I frankly think the process

01:34:47

10 that -- that we would like to undergo is if Ms. Haney or
11 any counsel for UTMB wishes to attend a particular
12 deposition, send me an e-mail, draft me a letter, explain
13 why. Let me address it. If I'm unreasonable, file a
14 motion with the Court as a process.

01:35:02

15 THE COURT: Well, we can do that. I was hoping
16 we would make some progress today, though, while we're all
17 together. And I think -- think she has said if you don't
18 want to use it outside of Bailey, he won't need to attend.

19 MR. EDWARDS: That's fine.

01:35:15

20 MS. HANEY: That's fine.

21 THE COURT: All right.

22 MS. BURTON: Okay.

23 MR. EDWARDS: And, Your Honor, if we -- if we
24 wish to use it in some other capacity, I suppose we would

01:35:24

25 just give notice to them and they can participate?

1 MS. BURTON: That's the problem.

2 THE COURT: Well, you have to give notice in
3 advance to the deposition that you're going to use.

4 MR. EDWARDS: Sure.

01:35:32

5 MS. BURTON: Okay. Well, Your Honor, that is
6 very concerning to me, because the subjects are not Bailey
7 specific, and I think you remember we spent hours in this
8 court going through each and every 30(b)(6) request. The
9 requests talk about --

01:35:49

10 THE COURT: Tell me what you want me to do.

11 MS. BURTON: Okay. I want you to allow UTMB to
12 go to those depositions.

01:35:59

13 THE COURT: Well, she says she doesn't even
14 want to attend, though, if -- if it's not going to be used
15 outside of Bailey.

16 MS. BURTON: Okay. But then do I present the
17 very same people a second and third time on the very same
18 subjects for the cases that UTMB --

01:36:11

19 THE COURT: You're talking about her not just
20 observing? You're talking about her getting an opportunity
21 to question them?

22 MS. BURTON: If that subject is relevant to
23 stuff related to UTMB, because there is a contract between
24 TDCJ and UTMB.

01:36:21

25 THE COURT: Well, you make good points. That's

1 going to make for a longer deposition and a longer
2 discovery schedule, generally, I think.

3 MS. BURTON: Well, that's why we are asking
4 that we not treat these cases as so completely separate
5 because --

01:36:36

6 THE COURT: Well, I --

7 MS. BURTON: -- some of the 30(b)(6) questions
8 were already deposed upon in the prior cases. We're trying
9 to avoid presenting, for instance --

01:36:48

10 THE COURT: It sounds like your --

11 MS. BURTON: Yeah, Mr. Stephens multiple times.

12 THE COURT: -- your colleagues may need a
13 minute on this.

14 Do you need a minute to confer?

01:36:59

15 MS. BURTON: Yes, we may.

16 MS. HANEY: Sorry.

17 THE COURT: I just need to know if I need to
18 get you a five-minute break or something.

19 MS. HANEY: No, Your Honor.

01:37:08

20 THE COURT: Tell me what you want to do. I
21 don't have a strong view on this. I just wanted to try to
22 accommodate all the different interests.

23 MS. HANEY: I think for the moment, I think
24 actually what Jeff proposed is reasonable, that if he does
25 have the intent and he anticipates -- I mean, if he

01:37:18

1 realizes before he takes a deposition that it's an issue
2 that's going to bear on medical and it might be something
3 that has -- that he's -- where he's getting evidence that
4 he might utilize in the wrongful death cases, then he would
5 give us notice ahead of time.

01:37:35

6 This opportunity not only --

7 THE COURT: But Ms. Burton is raising a
8 different point. She's saying that she doesn't want to
9 present these witnesses twice.

01:37:44

10 MR. ALVAREZ: Your Honor, if we could have just
11 a five-minute break to just discuss amongst ourselves.

12 THE COURT: Okay.

13 (Break taken from 4:09 to 4:21.)

14 THE COURT: Okay.

01:50:01

15 MR. ALVAREZ: Yes, Your Honor, Graig Alvarez
16 here for UTMB, and I think we have -- we can fashion an
17 agreement along these lines. If we can get an order that
18 states that if plaintiffs want to take the depositions in
19 Bailey, as long as those are not going to be used in the
20 heat-related death cases, then that's fine. To the extent
21 that they want to use any depositions in the Bailey case
22 for these -- the death cases, that UTMB get 14 days' notice
23 prior to those depositions so they can participate.

01:50:20

24 Would that be agreeable?

01:50:38

25 MR. EDWARDS: Yes, provided the 14-day is not

1 some hard and fast rule, if we can -- if people's
2 availability and like -- because some of these times, we're
3 rescheduling in the last second. So...

01:50:52

4 THE COURT: The thing, I would guess, would be
5 difficult for you, Mr. Edwards, is I suspect it's going to
6 depend part on what you get out of these depositions
7 whether you're going to use them or not.

01:51:06

8 MR. EDWARDS: Yes, I suppose -- I suppose
9 that's true, and here the dilemma, I think, falls on both
10 sides.

11 THE COURT: I agree.

01:51:16

12 MR. EDWARDS: What I want to make certain
13 happens, though, is if we choose to use -- say, no, we're
14 only going to go forward in Bailey and get some gold, that
15 we can re-depose, giving people proper notice and there's
16 not some objection.

17 THE COURT: That's what Ms. Burton wants to
18 avoid, I think.

19 MR. EDWARDS: Which is fine.

01:51:25

20 MS. BURTON: I realize that was pointed out to
21 me by co-counsel, that I haven't been exactly clear about
22 what I'm envisioning, and so what I would like to point out
23 is that we get kind of two categories of 30(b)(6)

01:51:43

24 depositions in Bailey right now. Some of them are Pack
25 Unit specific, and I can see why those would be limited to

1 the Bailey case.

2 But we have others, and I'll just give one
3 example, the creation and enforcement of policies related
4 to temperature, heat and inmate health and welfare in TDCJ
01:51:59 5 prisons, that is applicable to all the cases, how we create
6 these policies, how they're enforced, which policies apply.
7 Now, what I would propose is that when we're dealing with a
8 question like this, that the plaintiffs be allowed, because
9 I'm presenting at least two top people, Mr. Stephens and
01:52:19 10 Dr. Linthicum, to answer those questions.

11 THE COURT: What's the second name?

12 MS. BURTON: She is the head of health
13 services.

14 THE COURT: Why don't you spell it.

01:52:26 15 MS. BURTON: Pardon me. L-I-N-T-H-I-C-U-M.

16 So these are two top executives at TDCJ.
17 So I would propose that the plaintiffs be allowed to ask
18 all the questions they want with regard to the Bailey case
19 and the heat cases so that I do not have to schedule these
01:52:46 20 people two times or three times, and that UTMB be allowed
21 to attend those depositions.

22 THE COURT: And question?

23 MS. BURTON: Yes, because Dr. Linthicum will be
24 talking about policy that --

01:53:00 25 THE COURT: No, I understand. What that means,

1 though, I would wager for your witnesses, is the
2 depositions are going to be a little bit longer.

3 MS. BURTON: Correct. We understand that.

4 THE COURT: Okay.

01:53:10

5 MS. BURTON: But we really do have -- because
6 Dr. Linthicum, for instance, and Mr. Stephens are both --

7 THE COURT: Very busy, I'm sure.

8 MS. BURTON: -- very hard to schedule
9 time-wise, and that's why we're -- we would really like for

01:53:24

10 these to not have to be --

11 THE COURT: I understand. And I do applaud
12 everyone. It sounds like to me you're all trying to be
13 sensitive to one another's needs, and I appreciate that.

14 MR. EDWARDS: And I think the -- I think the
15 mistaken assumption here is before the Court ruled in Webb,
16 there were stays in effect which effectively meant we could
17 only proceed in Bailey as to 30(b)(6).

01:53:36

18 Now, you know, for that particular topic,
19 what I would -- what I think I would do is designate the
20 witness across a number of cases so that it would -- so
21 that UTMB would actually be a defendant in one of the
22 cases. I don't mind including Bailey occasionally, but
23 what I -- what I do mind is if we take a deposition in
24 Bailey without some sort of prior agreement, that there is
25 some King's X down the road, because that will be the

01:53:53

01:54:09

1 argument.

2 THE COURT: I think we better get everybody in
3 the deposition. I really do. I think we better.

4 MS. BURTON: Okay.

01:54:20

5 THE COURT: I know it's additional attorney
6 expense to UTMB, but I just -- I can just foresee something
7 unexpected being said. You very properly want to use it
8 somewhere else. They very properly say we were not given
9 the authorized notice. I just -- I think it's a recipe for

01:54:37

10 mischief. I really do.

11 MR. EDWARDS: Well, then we have no objection
12 to having UTMB in the room. The issue is whether or not
13 they're going to be questioning in the Bailey case.

01:54:49

14 THE COURT: Well, I think we've got to allow
15 them to question, because I don't think they've had
16 their -- their procedural protections if they have to sit
17 there mute.

01:55:01

18 MR. EDWARDS: Well, then in light of that,
19 Your Honor, would you also agree that there needs to be
20 additional time?

21 THE COURT: Yeah, I do. I do agree to that,
22 yeah.

23 MR. EDWARDS: Okay.

01:55:16

24 THE COURT: Okay. Ms. Burton, I think you were
25 the one who said we should discuss *Ball versus LeBlanc*

1 next.

2 MS. BURTON: That would be Mr. Greer.

3 MR. GREER: Your Honor, the Fifth Circuit has
4 given us quite a bit of direction, I feel, on this.

01:55:33

5 THE COURT: I think so, too.

6 MR. GREER: I'm not going to go in
7 chronological order as the opinion is written, but I'll go
8 with what I think is most important and is actually kind of
9 in reverse order.

01:55:43

10 With regard to the injunctive relief, I
11 think what we see quite clearly is that *Gates versus Cook*
12 is still good law. Air conditioning is not the remedy,
13 that mitigation measures can be implemented, ought to be
14 implemented, and that should be the remedy for heat.

01:55:57

15 That's what the clear message from this Court is.

16 One of the important things that they
17 decline to hold -- or that they felt they could not do
18 under the PLRA was set some sort of max temperature at
19 which a prison can be.

01:56:11

20 The question isn't about that. It's a
21 question about mitigation; and I think that's where this
22 case is headed, in light of that. And actually, I think we
23 were headed that way to begin with. Actually two days
24 before this, the plaintiffs filed an amended complaint, and

01:56:27

25 though there wasn't much fanfare, actually, their request

1 for injunctive relief changed. It changed from previously
2 when they were asking for 88 degrees heat index to some
3 heat index or whatever the Court thinks is appropriate to
4 mitigate that.

01:56:42

5 So I think we're already opening and going
6 down the road of mitigation is what the answer is going to
7 be here.

01:56:57

8 The Court also said some very important
9 things in the section about the injunction, and the first
10 is actually, and I think speaks to something we've been
11 hearing a great deal about from the plaintiffs, and that
12 has to do with the idea of preventability. What we've
13 heard a number of times from the plaintiffs is heat death
14 is entirely preventable, and therefore if there is one,
15 they're liable. There's a violation. And what the panel
16 held, it specifically said that standard does not know
17 risk. The standard is some reasonably -- socially
18 reasonable amount of risk, and some risk is inevitable.

01:57:11

19 So in terms of designing a system, it's
20 going to be based on mitigation measures. Anything beyond
21 that is going to be overbroad, and that's the most
22 important point from the injunction.

01:57:33

23 Now, there's a very important point, I
24 think, about the ADA that affects these cases. And I know
25 that's sort of in the middle and maybe not as prominent,

01:57:48

1 but what the Court held with regard to the ADA is -- well,
2 they didn't hold it. They actually left the question open
3 as to whether thermoregulation is a major life activity;
4 but they said even if it is, thermoregulation is a major
01:58:07 5 life activity, the standard is not whether there's some
6 degree of risk. The standard is to whether -- there is
7 evidence that they are actually being -- they are actually
8 having trouble thermoregulating.

9 So in that regard, what the plaintiffs are
01:58:26 10 going to have to prove, and I think it's important for the
11 Court to keep in mind, is that thermoregulation is the
12 activity in question, and there has to be evidence that
13 they're really not able to do it, not just that they might
14 be at some point. And that was what the flaw was that the
01:58:41 15 Fifth Circuit found.

16 So I think that does shift the inquiry,
17 and I think most importantly -- it comes in Footnote 12
18 where they -- the Court discussed the offender named Ball.
19 They discussed how he was a diabetic, and the plaintiffs
01:58:57 20 discussed how that affected his endocrine system and his
21 sight. And the Court said that may be well and good and
22 that may be so, but the issue here is thermoregulation.
23 And he may have other health issues, but unless those
24 affect his body to cool itself, then the ADA isn't met.

01:59:17 25 So I think that is some very good guidance

1 for us going forward on that issue.

2 Finally, I would like to address the --
3 the first half, which is -- the first portion, which is the
4 8th Amendment violation. And I think the Court said some
01:59:35 5 things here that are particularly relevant to us in terms
6 of class certification. And I would point the Court to
7 Footnote 6 which appears on page 10, I believe it is, and
8 the Court wrote, "We emphasize, however, that the findings
9 of substantial risk regarding a heat-related injury is tied
02:00:00 10 to the individual health conditions of these inmates."

11 And I think that --

12 THE COURT: That's certainly an unexceptional
13 statement.

14 MR. GREER: I'm sorry?

02:00:13 15 THE COURT: That's an unexceptional statement.
16 I think we all would agree that -- substantial risk, but
17 how do you deal with that when you've got 1400 people in
18 the unit?

19 MR. GREER: I think that's the exact problem
02:00:25 20 that we have in determining commonality and typicality. In
21 other words, what the Court is saying, you cannot decide
22 with one fell swoop every single person here is at a
23 substantial risk. It all turns on the individual --

24 THE COURT: Then that takes us back to
02:00:37 25 availability of medical records and how many will be

1 produced and all that, I think.

2 MR. GREER: I think -- and that -- it does,
3 Judge. And that's exactly why this -- we cannot meet
4 commonality here.

02:00:49

5 The 8th Amendment in terms of deliberate
6 indifference turns on a quantum of risk, a threshold of
7 risk at which a bad event gets so likely that -- the
8 possibility of it happening, that the 8th Amendment is
9 violated. And that's different for every single person.

02:01:06

10 So for us to just take a whole class of
11 people at one prison and say they are at a constitutionally
12 high level of risk, it's just impossible.

02:01:21

13 THE COURT: Well, lawyers, you're always told
14 that because a question is hard doesn't mean we shouldn't
15 even try. I mean, do you have an approach you'd like to
16 recommend to the Court?

17 MR. GREER: In terms of meeting that, I think
18 the best way to start is by looking at the individual
19 plaintiffs.

02:01:31

20 THE COURT: Well, I agree that's a starting
21 point, but where does that take us? I mean, you don't want
22 1400 lawsuits.

02:01:46

23 MR. GREER: We don't, Your Honor, but at the
24 same time, the remedy for each individual person may be
25 different, and PLRA mandates we choose the narrowest means

1 to solve this problem. And a blanket order to say
2 air condition the whole prison is going to be overbroad
3 because everyone is different.

02:02:01 4 THE COURT: Well, I think LeBlanc made clear
5 that that's going to be reversed. The holding that we have
6 to air condition everything, I think that's going to be
7 reversed. But I'm not sure Ball was saying -- because each
8 individual's -- each individual's health is different,
9 therefore all class-based remedies are inappropriate, I'm
02:02:25 10 not sure it's saying that.

11 MR. GREER: It goes to the element of
12 commonality and typicality, and the challenges that we're
13 going to have -- that the plaintiffs will have, quite
14 frankly, which they're going to have to establish, that we
02:02:37 15 can certify a class. And that's what they're going to have
16 to meet initially to go forward; otherwise, we're
17 proceeding under five individuals.

18 So in that regard, I think it's important
19 for us to heed that advice when we're considering the
02:02:49 20 commonality and typicality elements when we're getting to
21 class certification. The individual nature of this makes
22 it such. It's not a one-fell-swoop issue that we can just
23 decide for all these people. I realize in some ways, that
24 makes it more cumbersome, but that is the plaintiffs'
02:03:04 25 burden to meet.

1 The one last thing I wanted to turn to in
2 terms of the 8th Amendment section has to do with the Gates
3 remedies. And I'm -- I'm sure where we're headed here is
4 where the plaintiffs will want to make the first half of
02:03:20 5 this opinion portable to this case. They're going to want
6 to say they held there was an 8th Amendment violation in
7 Louisiana; there should be one here as well.

8 And so I'd like to point out the
9 differences, first and foremost, that I think the evidence
02:03:37 10 is going to show in this case, based on the Texas -- the
11 situation at the Pack Unit and the situation in Louisiana
12 that the Fifth Circuit was -- was examining. And that has
13 to do with things that Your Honor has seen personally, the
14 distribution of ice water which is taking place 24 hours a
02:03:52 15 day, not just seven -- not just once a day like in
16 Louisiana, the distribution of individual fans, the use of
17 the showers, the ventilation. So in terms of the
18 portability of finding an 8th Amendment violation there
19 means there's one here, there's different circumstances
02:04:08 20 here, and the evidence is going to show that.

21 Finally, Judge, I wanted to point out --
22 in terms of imposing the same decision on this case, I
23 wanted to point out that -- that I think our evidence is
24 going to be different in terms of what we present to the
02:04:26 25 Court. Dr. Vassallo, I think, went in some ways unrebutted

1 here, and I think that's one of the issues the Fifth
2 Circuit had. In other words, Louisiana's position was,
3 they took these three inmates. They looked at their
4 history. They said they didn't have an incident in the
5 past, therefore, they're unlikely to have one in the
6 future. And that was the essence of their defense.

7 While that will be an element of what
8 we're going to be presenting, it will actually be a lot
9 more. In terms of experts opining on matters like
10 acclimatization and some of the issues that the Court went
11 with here and that Dr. Vassallo said, we'll have a much
12 clearer and more robust record on those.

13 So in terms of just importing that
14 decision saying there's an 8th Amendment violation in
15 Louisiana, therefore there must be one here, I think the
16 Court's going to have to wait and see the evidence and the
17 facts that we present. I think they're going to be very
18 different.

19 I think that's all I have on that.

20 THE COURT: Okay. Thank you very much.

21 Does UTMB want to say anything about this
22 issue?

23 MS. HANEY: No, Your Honor.

24 THE COURT: Okay. Yes, sir.

25 MR. EDWARDS: This will not come as a surprise

1 to you, but we read the case quite differently.

2 The first thing I want to make clear --
3 and obviously, we'll argue certification at the appropriate
4 time, but I'll address some of that because Mr. Greer
02:05:52 5 brought it up, but first and foremost, nothing in the Ball
6 decision forecloses the remedy of air conditioning. What
7 the Ball decision holds is that you need to award the least
8 restrictive means of remedying the danger, and the danger
9 is the substantial likelihood of a heat injury, and that is
02:06:13 10 the 8th Amendment violation that they upheld in the Ball
11 case.

12 So while -- while we are under, I suppose,
13 an increased burden to show you via evidence that that may
14 be the only means if that is -- if that's the way that --
02:06:28 15 that we choose to try our case, if there are less
16 restrictive means which eliminate the problem, then I think
17 Ball is directly on point and would suggest that those are
18 the remedies. However, if there aren't, nothing about Ball
19 says that with the appropriate evidence, that that
02:06:48 20 air conditioning is foreclosed.

21 And the reason is quite simple. The Ball
22 case involved three plaintiffs. Replete within the -- the
23 briefing is the notion, this is not a class action. This
24 is not brought on behalf of everyone. Yet the relief was
02:07:06 25 so broadly drawn, that applied to everyone.

02:07:21

1 Here, this is a class action and one of
2 the -- one of the issues that the Court will have to spend
3 some significant time on, and I assure you that our
4 evidence will go to, is substantiating why this is an
5 appropriate vehicle for a -- for a class action.

02:07:38

6 The standard that Mr. Greer and that TDCJ
7 wish to amount to is us showing, well, look, not everybody
8 is affected by heat in exactly the same way, and a
9 68-year-old diabetic may be slightly different from a
10 52-year-old diabetic, but that -- that's a red hearing,
11 really. Because, you know, that would -- that would imply
12 that, hey, sewage is running up through the bathrooms, but
13 you know what, a 27-year-old kid can handle it. He's not
14 going to die of dysentery, but a 65-year-old man is.

02:07:55

15 Cruel and inhumane treatment, conditions
16 that violate the minimal necessities of life, that's --
17 that's the standard. And here, there will be ample
18 evidence to show that we need them. And, yes, we will take
19 the findings in Ball and make an argument that they're
20 entirely consistent, because it's very important that the
21 Fifth Circuit found that temperatures that high, exactly
22 the same temperatures that you experience personally, that
23 independent verified recordings show, are present at the
24 Pack Unit.

02:08:32

25 Now, as to common issues of law and fact,

1 there are going to be common issues of law and fact. And
2 we will present cases. We will give you all the support
3 that we think you need to find that this is appropriate as
4 a class action. What Ball really means is, look, if you're
5 going to go for such an important dramatic remedy as
6 air conditioning, a system, then you need to do so as a
7 class action.

8 Otherwise, there are too many ways to
9 divert -- or too many remedial measures which could, in
10 theory, help the particularly aggrieved plaintiffs. Where
11 I don't disagree with Mr. Greer is we will need to show
12 that diabetics under the ADA are impacted, but we will.
13 Diabetics, all diabetics, have great difficulty
14 thermoregulating. That is a consequence of the disease.
15 Okay? All 65-year-olds and up, according to
16 epidemiological standards, are at higher risk.

17 Now, unless the Fifth Circuit is ready to
18 do away with the science of epidemiology, then a class
19 action will be appropriate in this case, provided we -- we
20 show you the evidence. And on that, there's very little,
21 very little disagreement. I think Footnote 7 in the Webb
22 appeal is the footnote that we ought to be focusing on,
23 because it lays to rest the notion of what risk is. And
24 this notion that no one has died before is some sort of
25 King's X, it puts an end to that argument, at least from

1 the Fifth Circuit.

2 And so, you know, Ball is very important
3 in that it found an 8th Amendment violation. It is very
4 important in terms of giving you a guide map to what will
02:10:29 5 need to be done under the ADA for the particular
6 disabilities at issue. And very significantly in the Ball
7 case, though they made some last-minute attempt to brief
8 the issue, there was no evidence, and the justices point
9 this out. Not even a question was asked as to how the
02:10:48 10 disease is impacted by the cruel condition of extreme heat.

11 So that will be on the lawyers to provide
12 you with the evidence. But I think Ball is clear. There
13 can be an 8th Amendment violation. Ball is clear that
14 that -- that air conditioning is not the correct focus.
02:11:07 15 What the correct focus is, is how to eliminate the risk
16 that is the constitutional violation. And if they put
17 forward evidence that suggests a cup of water does it, and
18 you believe them, and you find their experts more credible,
19 then I suppose we won't prevail.

02:11:28 20 But if you find our experts more credible
21 on the issues of who is at risk, why they're at risk, how
22 their bodies are affected, there is a reason that diabetics
23 and hypertensive people and people on diuretics died, and
24 it is because of their medical conditions. Everyone is at
02:11:51 25 risk. Everyone -- everyone is affected in a grossly

1 negative way by the extreme heat, but -- but we'll put
2 forth that evidence.

3 And that's -- that's really what we think
4 Ball -- Ball illustrates, and it does give you some
02:12:07 5 contours to work with, and I assure you that we will do our
6 very best to provide you the evidence to fashion whatever
7 remedy you feel is appropriate.

8 Thank you.

9 THE COURT: Okay. Okay. At some point, we
02:12:26 10 need to talk about the medical records issue. And it's my
11 understanding that 29 complete sets of records have been
12 produced, approximately 34,000. Defendants want me to
13 limit the number of offender medical records to be produced
14 to a total of 70, and defendants say that's a recommended
02:12:59 15 sample size for the Pack Unit. I'm not a statistician. I
16 don't know what the appropriate sample size would be, and I
17 don't know how -- I don't know if the appropriate
18 methodology would be to do it absolutely by random or to do
19 it by age bracket or some other way.

02:13:20 20 But let me -- it's defendants' motion, so
21 let me hear from you on that, please.

22 MS. BURTON: Okay. Your Honor, the reason that
23 motion was filed is because all medical records were being
24 requested. As we've pointed out, we had a huge discovery
02:13:38 25 request, and in the response, the plaintiffs indicated that

1 they weren't seeking records. So I -- I have to admit, I'm
2 very confused about what it is the plaintiffs want. We've
3 got discovery requests and yet we've got a motion that says
4 they're not actually seeking all of that.

02:13:56

5 So in an abundance of caution, I sought
6 information from our medical doctors in health services
7 about what would kind of be an appropriate number in the
8 situation that we're in. But it's really not defendants'
9 burden to determine the proper statistical sampling that's
10 necessary for plaintiffs to test and use records in order
11 to demonstrate commonality and typicality.

02:14:16

12 What I was trying to say to the Court is,
13 we do have a number here, and this is the most that we feel
14 we should have to produce just because of the size of the
15 records, some proposals made by health services doctors and
16 also with time for the experts to review. But we're coming
17 into a stage now where we are getting ready for the
18 briefing on the class certification. We have five new
19 plaintiffs that have been added in the amended complaint

02:14:35

02:14:58

20 whose medical records will now have to be obtained, and so
21 we're running into deadlines now that it would not really
22 even be possible for us within the deadlines, to obtain and
23 review an additional 40 to 50 medical records in time for a
24 proper statistical study to be done on whether, indeed, you
25 have commonality and typicality.

02:15:20

1 Now, we assert that you can't have
2 commonality and typicality because each of the offenders
3 has multiple types of conditions.

02:15:37

4 So at this point, I think that the medical
5 records that we have are the medical records that we're
6 going to have to work with, including the new plaintiffs.

7 THE COURT: Well, would the 70 records, would
8 they be just totally random, or would --

02:15:51

9 MS. BURTON: No. We had -- there's a couple of
10 ways that we can do it, but we can, for instance, choose
11 randomly the -- from the 400 heat-sensitive offenders. We
12 could choose a certain number randomly from the
13 approximately 60 wheelchair offenders, or we could take the
14 whole list of 1400 offenders and choose randomly --

02:16:12

15 THE COURT: Okay.

16 MS. BURTON: -- you know, a certain number.

17 THE COURT: Okay.

18 MS. HANEY: Your Honor --

19 THE COURT: Yeah, you can.

02:16:20

20 MS. HANEY: Yes, I need to speak on behalf of
21 my client, since obviously UTMB is the custodian of
22 records, and we would just ask that the Court be sensitive
23 to the fact that it -- they have a limited number of people
24 to produce these records, and if there are a large number
25 to be produced, we would just ask to be given consideration

02:16:33

1 and time.

2 THE COURT: Yeah. Do you have a limiting
3 principle that's proposed?

02:16:46

4 MS. HANEY: It really just depends on the
5 volume per plaintiff. I mean, because this is a geriatric
6 facility, most of these people have extensive medical
7 records sort of beyond the norm. I think the smallest set
8 I've seen in this is several hundred pages for one
9 offender. So...

02:17:02

10 THE COURT: Okay. Yes, sir.

02:17:22

11 MR. EDWARDS: I do think we're putting the cart
12 a little bit before the horse. You know, the burden is on
13 us to show why these individual disabilities or diseases
14 place people at risk. And it is not our position that we
15 need a certain amount of medical records at all. It is our
16 position, and it will be substantiated with expert
17 testimony, that the very diseases, whether their
18 comorbidity, such as having hypertension and diabetes, or
19 simply diabetes, there are certain risk groups that
20 epidemiological studies associate with greater risk to heat
21 injury. It is not necessary to go through 78 -- 378
22 medical records, at least that's our position. If the
23 Court -- if the Court disagrees after seeing our -- our
24 brief on that, then I suppose we could --

02:17:38

02:17:56

25 THE COURT: No, I'm not sure I'm going to

1 disagree with that, but tell me what you were -- ask for
2 now.

3 MR. EDWARDS: I don't ask for anything. I
4 mean, that's why -- I mean, they picked a number, limit
02:18:07 5 this to 40 records, and we said, what are you talking
6 about? We'll request the records we want to request,
7 and --

8 THE COURT: Are you going to sharp-shoot by
9 individual patient? Is that what you're going to do?

02:18:18 10 MR. EDWARDS: Well, our experts will review the
11 individual plaintiffs' records to make sure that their
12 diseases are supposed -- are not outliers, but -- but the
13 commonality comes from the disease. The commonality comes
14 from the age of over 65. The commonality comes from that.
02:18:35 15 But, again, I don't think it's appropriate for us to be
16 arguing the certification issues.

17 THE COURT: No, I --

18 MR. EDWARDS: In terms of the limit of 40, I
19 have a number of problems --

02:18:45 20 THE COURT: 70. 70 is what they're proposing,
21 which means 41 more.

22 MR. EDWARDS: Well, I guess, here's -- I mean,
23 the one thing that I agree with Ms. Burton about is that it
24 should be us coming to you saying we need a specific
02:18:57 25 statistical sample. It is -- it shouldn't -- it's not the

1 defendants' place to, A, suggest a number and, B, let alone
2 suggest a number with absolutely no statistical
3 significance. They didn't supply an affidavit saying that
4 this would be a statistically appropriate sample.

02:19:13

5 THE COURT: And make --

6 MR. EDWARDS: It seems to be all about
7 minimizing the burden on UTMB in terms of producing records
8 when we haven't even requested them.

02:19:22

9 THE COURT: Okay. I thought you had generally
10 said that you needed some medical records. Is that not
11 right? Have you not made any requests?

02:19:35

12 MR. EDWARDS: Well, I suppose there could have
13 been a request early on that could be interpreted that way.
14 As of now and in terms of our experts which we're
15 designating on August 3rd, it is not our intent to have 150
16 medical records reviewed. I think that issue may come down
17 the line if -- if the Court is of the opinion that the
18 disease in and of itself somehow destroys your ability to
19 certify.

02:19:49

20 But, you know, it's -- our position is not
21 that it's necessary to review 1,400 people's medical
22 records. What's necessary is for us to know, look, does
23 the Pack Unit have a substantial number of diabetics? Does
24 the Pack Unit have a substantial number of hypertensive
25 patients? If they do, what risk, as a general matter, does

02:20:05

1 that place on the people, and is it a common enough risk
2 such that you can certify it? We respectfully suggest that
3 that question won't be a close call, but it -- at the
4 current time, that's -- that's where we are with this.

02:20:26

5 So in our response, which may have been
6 confusing to Ms. Burton, was, look, you're arguing about
7 something that we're not seeking, at least at the current
8 time, Your Honor.

9 THE COURT: So it's premature?

02:20:37

10 MR. EDWARDS: I think it's premature, yes.

11 MS. BURTON: If I -- Your Honor, this is what's
12 so confusing, because as I pointed out in our reply, we had
13 requests, multiple requests, by subpoena to UTMB for
14 hundreds of medical records, and some of them --

02:20:55

15 THE COURT: Who were the subpoenas issued by?

16 MS. BURTON: Pardon me?

17 THE COURT: Who were the subpoenas issued by?

18 MS. BURTON: Plaintiffs.

19 THE COURT: Now I'm very confused. You say

02:21:04

20 she's not asking for a particular number?

21 MS. BURTON: That's why we're confused.

22 MR. EDWARDS: They certainly haven't been
23 produced.

24 MS. BURTON: That's right.

02:21:12

25 THE COURT: One at a time. One at a time. You

1 go next.

2 MS. HANEY: Jeff subpoenaed from UTMB 467
3 medical records, and I think this is part of TDCJ's
4 concern. So...

02:21:24

5 MR. EDWARDS: To the extent there's any
6 confusion, Your Honor, we are not seeking the medical
7 records of all heat-related -- all inmates who would be --

8 THE COURT: What are you seeking? What are you
9 seeking?

02:21:32

10 MR. EDWARDS: I'm seeking nothing at the
11 current time other than the new plaintiffs. I would
12 definitely want their medical records to the extent they
13 haven't already been provided. However, at this time, we
14 are not seeking them. I agree on the record that if we
15 decide that that is a route that we need to go down, we
16 will move the Court for that.

02:21:43

17 MS. BURTON: So they're withdrawing their
18 subpoena, then? Is that -- you're withdrawing all these
19 requests in the subpoena?

02:21:55

20 MR. EDWARDS: Cynthia, you'll need to show me
21 exactly what it is, but I just on the record stated exactly
22 what I mean, and after the fact if you want to show me a
23 particular request, I will address it.

02:22:07

24 THE COURT: Okay. Well, I'm going to -- I'm
25 going to decide that there are no currently pending

1 requests for medical records.

2 We entered an order. Do we want to --
3 about scheduling. Do we want to try to set a date for
4 class certification argument?

02:22:39

5 MR. EDWARDS: Yes, Your Honor.

02:23:02

6 MS. BURTON: I think -- I think we will need a
7 date, but we haven't completed the 30(b)(6) depositions
8 that are pending right now, some of which go to the issues
9 of class certification. And so I think that this -- we had
10 already had some informal discussions by letter that there
11 may be a change in the expert deadlines, because their
12 experts are needed or need the depositions that we're doing
13 right now. So...

02:23:19

14 MR. EDWARDS: Your Honor, we intend to move for
15 class certification on -- I think it's August 3rd.

16 MR. MEDLOCK: August 12.

17 MR. EDWARDS: August 12.

02:23:36

18 THE COURT: Let me just raise one issue. A lot
19 of parties who are in class action cases want the summary
20 judgment issue to be decided before class certification.

21 Excuse me. Excuse me, want the class certification decided
22 before summary judgment. The theory is people ought to opt
23 into the class before they know whether -- which way
24 summary judgment is going to be decided; otherwise, if

02:23:56

25 class certification is post summary judgment and summary

1 judgment goes against the plaintiffs, then nobody -- the
2 class is going to vanish.

3 So there is that -- maybe it's not a
4 concern here, but -- but it strikes me as it perhaps is a
02:24:11 5 concern, that the certification choice ought to be made
6 before summary judgment ruling.

7 MS. BURTON: We had set up the schedule that
8 way, Your Honor. We hadn't been able to make dates for the
9 class certification hearing or determine what kind of
02:24:27 10 hearing it was going to be. The defendants had suggested
11 an evidentiary hearing with live witnesses. The plaintiffs
12 are suggesting a decision on class certification based on
13 the briefing.

14 Is that correct?

02:24:40 15 MR. EDWARDS: Yeah, I guess that -- that is
16 a -- that is a difference of opinion, which I think that
17 the Court would -- if the Court could give us guidance.
18 It's been my experience in class action litigation, that we
19 would brief the certification issues, and then we would
02:24:56 20 hold a hearing where the lawyers are arguing about what the
21 evidence in the brief says, not that we hold a five-day
22 trial or a three-day trial.

23 THE COURT: It depends on what the issues are.
24 I mean, it's just hard to know. It's hard to know in
02:25:09 25 advance. I always prefer to decide things on the papers

1 because I know how expensive it is for all of you to come
2 here.

3 Okay. Right now, we have plaintiffs'
4 reply on class certification October 9th, so we're talking
02:25:25 5 about sometime in October or November I'll try to decide
6 the class certification.

7 MS. BURTON: Correct.

8 THE COURT: Okay.

9 MR. EDWARDS: And then, Your Honor, just in
02:25:35 10 terms of scheduling purposes, the month of October for my
11 particular law firm, we are set for trial October 19th in
12 federal court, October 26th in state court and then have
13 kind of a month-long October setting in a two-day trial.
14 So obviously, this case is going to take precedence in
02:25:57 15 terms of what we do.

16 THE COURT: I'll try not to burden you in
17 October, then. Okay?

18 MR. EDWARDS: Thank you, Your Honor.

19 THE COURT: Is there anything else we can try
02:26:05 20 to do today?

21 MR. EDWARDS: The only other thing, Your Honor,
22 that I think would be helpful would be whether or not
23 you -- we would respectfully ask that you do set McCollum
24 for trial and would propose June or July of next year,
02:26:18 25 which we would hope would give everyone ample time to do

1 whatever briefing they need.

2 THE COURT: June or July is then assuming that
3 there won't be an interlocutory appeal?

02:26:31

4 MR. EDWARDS: I think we can address -- I would
5 think that the setting of June and July would be helpful to
6 everyone, and then depending on what the defendants do with
7 regards to interlocutory appeals, we could revisit the
8 issue with another status conference.

02:26:49

9 MS. BURTON: I'm just -- I thought we were
10 working with McCollum solely on the limited issues of
11 qualified immunity, that we were starting with that. I'm
12 not sure whether discovery is going to re-open then.
13 Because otherwise, we don't have a problem with a June or
14 July trial date, but there is other discovery to be done.

02:27:08

15 THE COURT: Well, I guess -- I guess the issue
16 is whether it does us any good to set a trial date when we
17 don't have some of these other dates. It wouldn't hurt
18 to -- let's get something on the record, and that way, we
19 can aim for that. It may not work out. Let's see what we
20 can do.

02:27:23

21 MS. HANEY: That's what I was going to suggest,
22 Your Honor, is that I think we're fine with the June or
23 July date, provided we have these other deadlines, and we
24 can certainly be working with that. We can always revisit
25 with the Court if we realize we need more time.

02:27:32

1 THE COURT: Yeah, I don't care what date you
2 set for like close of discovery, as long as it doesn't
3 affect the trial date. And normally, the dispositive
4 motion deadline is 90 days in advance of trial. So other
5 than those dates, you can set what you want.

02:27:46

6 MS. HANEY: I think it's fine, Your Honor.

7 THE COURT: So what time?

8 MR. RIVERA: Is June 6th available?

9 THE COURT: June 6th of 1916 -- of 2016?

02:27:57

10 MS. HANEY: I think that's fine, Your Honor.

11 THE COURT: Okay. Very good. Thank you.

12 (Concluded at 4:59 p.m.)

13

14 COURT REPORTER'S CERTIFICATE

15

16 I, Kathleen K. Miller, certify that the foregoing is a
17 correct transcript from the record of proceedings in the
18 above-entitled matter.

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20 /s/
Kathleen K. Miller, RPR, RMR, CRR

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